79-6898

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. 894/77

JOHN L. GRADY et al., and FATIMA GRADY,

Appellants,

— v —

RODERICK A. McLEAN, M.D.,

Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

JOHN L. GRADY
Appellant Pro Se
P.O. Box 27
Elmwood Station
Syracuse, New York 13207

DATE: June 25, 1980.

TABLE OF CONTENTS

	Page
Opinions Below	1
Grounds Invoking Jurisdiction	2
The Nature and Statutes of the Proceeding	3
Prior Proceedings and Orders Sought for Review	4
Questions Presented	5
Statement of the Case	7
Rule 33 Part VIII	12

APPENDIX:

Order from United States Court of Appeals, Second Circuit, entered 11-11-76	A1
Notice of Appeal to United States Supreme Court from Final Judgment, Received on 6-3-80 at State Court of Appeals, Albany, New York	A4
Affidavit of Service of Notice of Appeal to the United States Supreme Court	A6
Order Appealed From, entered 4-29-80	A8
State Court of Appeals — Clerk's Opinion, dated 5-15-80	A9
Appeal by Leave to Court of Appeals, dated 4-9-80, entered 4-9-80	A11

Table of Authorities:

Cases cited:

Application of Bingemann, 1961, 28 Misc.2d 595, 215 N.Y.S.2d 557	8
Application of Scotti, 1976, 53 A.D.2d 282, 385 N.Y.S. 2d 659	9
Bennet v. *Dorothy Lamour, Inc.*, 1961, 13 A.D.2d 816, 216 N.Y.S.2d 306	10

Page

Brooklyn Trust Co. v. *Wheeler*, 1948, 81 N.Y.S.2d 762 ... 8

Cox Broadcasting Corp. v. *Cohn*, 43 L. Ed.2d 328, 1975 .. 3

Duby v. *Martin*, 109 N.Y.S. 2d 503 (1951) 9

Federal Schools v. *Saponaro*, 1941, 25 N.Y.S. 2d 313 8

Goss v. *Lopez*, 42 L.Ed.2d 725, 1975 11

In E.P. Reynolds, Inc. v. *Nager Electric Company*, 1966, 17 N.Y.S.2d 51, 268 N.Y.S.2d 15, 215 N.E. 2d 339, 21 A.D. 2d 1025, 194 N.Y.S.2d 111 1 11

In re Wilmark Service System, Inc., 1964, 21 A.D.2d 478, 251 N.Y.S.2d 267 9

Johnson v. *Risk*, 137, U.S. 300, 307 11

Lawrence v. *State Tax Commission*, 286 U.S. 276, 282 ... 11

Matter of Galvin's Estate 153, Misc. 11, 274 N.Y. Supp. 846 (1934) 8

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 1954, 74 S.Ct. 396, 347 U.S. 157, 98 L.Ed. 583 11

Monticello Mut. Building & Loan Ass'n v. *Rapp*, 1932, 235 A.D. 304, 256 N.Y.S. 909 11

Murdock v. *City of Michigan*, 20 Wall, 590, 1875 11

New Orleans Waterworks v. *La. Sugar Refining Co.*, 125 U.S. 18, 1888 11

Osborn v. *Bank of United States*, 1824, 9 Wheat, 738, 823, 6 L.Ed. 204 12

People ex rel Ryan v. *Lynch*, 1933, 262 N.Y. 1, 86 N.E. 28 3

People v. *Foote*, 1934, 241 A.D. 846, 271 N.Y.S. 681 11

Powell v. *Schoellkopf*, 197, App. Div. 471, 188 N.Y. Supp. 297 (4th Dep't. 1921) 9

Richfield Oil Corp. v. *State Board*, 329 U.S. 69, 72 9

Page

Siler v. *Louisville & Nashville R. Co.*, 1909, 29 S.Ct. 451, 213 U.S. 175, 53 L.Ed. 753-29 S.Ct. at 454, 213 U.S. at 191 and Siler Rule 53 S. Ct. at 589, 289 U.S. at 245-246 12

South Carolina Elec. & Gas Co. v. *Flemming*, 1956, 76 S.Ct. 692, 351 U.S. 901, 100 L.Ed. 1439 12

Stanley v. *Illinois*, 405 U.S. 645, 1972 12

U.S. v. *Topeka Livestock Auction, Inc. D.C. Ind.*, 1975, 392 F.Supp. 944 10

Valz v. *Sheephead Bay Bungalow Corporation*, 1928, 249 NY 122, 163 N.E. 124, certiorari denied 49 S.Ct. 82, 278 U.S. 647, 73 L. Ed. 560 12

Walsh v. *Gray*, 214 A.D. 296, 212 N.Y.S. 230 8

Williams v. *Mayor and City of Baltimore*, 1933, 53 S.Ct. 431, 289 U.S. 36, 77 L.Ed. 1015 2

Miscellaneous Law:

Act of Sept. 24, 1789, Sec. 25, 1 Stat. 73, 85 and Sec. 28 U.S.C.A. Sec. 2103 2

Act of Sept. 19, 1962, Pub. L. 87-669, Sec. 1, 76 Stat. 556 2

Civil Practice Law And Rules:

215 8
2221(a)(1)(2) 10
3011 8
3020(b)(c) 8
3121 10
3024(c) 8
5015(a) 10
5514(a) 2
5704(a) 9

Constitution, Article III, Sec. 2. par. 1 7

Page

C.P.A.:
Sec. 98 8
Sec. 263; Sec. 260 8

ERCP(6)(d) 8

Federal Statutes:
Article III, Section 2. 3
Article IV, Section 2., Amendments 5 and 14 3

FRCP:
Rule 37 8
54(c) 10
55(2)(c) 10
56(e)(g) 8

N.Y. State Statute CPLR 5601(b) 1 2

R.C.P. 88 8

Rule 33 Part VIII, 2b, 28 U.S.C. Section 2403 ..... 11, 12

Ruling Case Law Summaries several decisions of the Supreme Court, R.C.L. 1262 8

Title 28 United States Code: Section 1257 1 3

Miscellaneous Opinion:

Cohen and Karger, Powers of the New York State Court of Appeals, p. 250 (rev., ed., 1952) 12

In The

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No. 894/77

JOHN L. GRADY et al., and FATIMA GRADY,

Appellants Pro Se,

— v —

RODERICK A. McLEAN, M.D.,

Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

In Court Of First Instance:

New York Supreme Court, Onondaga County, Special Term, Syracuse, New York. S.C. Justice John R. Tenney in his letter said: I see no basis for vacating my previous order (dated 6-13-77), and the motion to modify or vacate is denied. (Reviewable Record, p. 22)

At trial, S.C. Justice Edward F. McLaughlin in his letter dated July 14, 1977 (Reviewable Record, p. 53), to Judge Tenney, said: He was holding several motions made by plaintiffs and defendant, one of which must be referred to Judge Tenney, which was a motion to vacate Judge Tenney's order,

allowing late service of an answer by defendant, since any motion to modify or vacate an order must be heard by the judge who issued it.

In The State Court of Appeals:

The Clerk of the Court in his letter dated May 15, 1980 said: that CPLR 5514(a), provided an automatic extension of time within which to take an appeal as of right, when a motion for leave to appeal has been denied. Presuming the order appealed from, is in fact an appealable order within the meaning of CPLR 5601. That Appellants' motion for such extension is therefore a nullity upon which no further action will be taken.

GROUNDS INVOKING JURISDICTION

Inherent in the concept of due process of law, as contained in the Fifth and Fourteenth Amendments, is the requirement that all legislation be reasonable, for the means selected. But the legislative foundation upon which state statute CPLR Sec. 5601(b) 1 rests has no real substantial relation to the purpose it seeks to be accomplished. However, Appellants are forced to forgo their privilege of direct appeal, on a question as to the validity of N. Y. State Statute CPLR 5601(b) 1; as being repugnant to the Constitution, or that it stood as an obstacle to the full objectives of Congress. Instead; in order to bring all the questions before the Court. (*Williams* v. *Mayor and City of Baltimore*, 1933, 53 S.Ct. 431, 289 U.S. 36, 77 L.Ed. 1015). The Supremacy Clause is sufficient basis on which to rest Supreme Court jurisdiction over state Court decisions.

Whereupon, the First Congress, in the famous section 25 of the Judiciary Act of 1789, authorized review of state Court decisions, as herein is involved a "federal question". See Act of Sept. 24, 1789, Sec. 25, 1 Stat. 73, 85. Sec. 28 U.S.C.A. Sec. 2103, as amended, Act of Sept. 19, 1962, Pub. L. 87-669, Sec. 1, 76 Stat. 556.

Exceptional Circumstances:

Court of Appeal's construction of the state's constitution on federal question presented as: Excess in abuse of state Court's jurisdiction, was determinable on both state and federal grounds of the Constitution. (*People ex rel Ryan* v. *Lynch*, 1933, 262 N.Y. 1, 86 N.E. 28), after State Court of Appeals has previously decided the federal issue, holding that no appeal lie. The Court recognizes three exceptions to the final judgment in this case: Further proceedings were had, and the federal claim was ruled invalid at pleading stage. Where federal issue has been decided by the highest state court, the issue survives, and requires federal review *regardless* of outcome of further proceedings. State Appeals Court decided against the federal claim, but the case was remanded, without trial on the merits, and Plaintiffs lost. State Court will not permit Appellants to again raise federal claim for review. (*Cox Broadcasting Corp.* v. *Cohn*, 43 L. Ed.2d 328, 1975). (See Exhibit p. 37 — Appellants' Cross Motion showing further presentation of the Federal Question at the Appellate Division level, served 9-13-77).

Now the granting or denial of relief depends directly and ultimately upon the construction of the Constitution. Where Appellants have been injured by the acts in abuse as above shown.

THE NATURE AND STATUTES OF THE PROCEEDING

Excess in abuse of jurisdiction fairly comprises all federal issue involved which was brought pursuant to Federal Statutes: Article III, Section 2.; Article IV, Section 2., Amendments 5 and 14.

Jurisdiction to review this case is conferred by Title 28, United States Code, Section 1257 1.).

PRIOR PROCEEDINGS AND ORDERS SOUGHT FOR REVIEW

Order from U.S. Court of Appeals, 2nd Cir., entered 11-11-76.

Special Term - Exparte Order to Show Cause, dated 6-1-77, Not entered*/

Special Term — Order, dated 6-13-77, entered 6-16-77 (Reviewable Record, p. 22).

Special Term Memorandum Decision & Order, dated 7-14-77, entered 7-21-77 (Reviewable Record, p. 28).

Appeal to Appellate Division, Fourth Dept., dated 7-18-77, served 7-18-77 (Reviewable Record, p. 30).

Special Term Order, dated 8-8-77, entered 8-11-77 (Reviewable Record, p. 31).

Appeal to Appellate Division, Fourth Dept., dated 8-29-77, served 8-29-77 (Reviewable Record, p. 33).

Appellate Division Order, dated 9-23-77, entered 9-23-77 (Reviewable Record, p. 38).

Appeal to Court of Appeals, dated 9-28-77, served 9-28-77 (Reviewable Record, p. 39).

Court of Appeals Order, dated 11-21-77, entered 11-21-77 (Reviewable Record, p. 44).

Special Term Order, dated 10-5-77, entered (Reviewable Record, p. 40).

Appeal to Appellate Division, Fourth Dept., dated 10-31-77, served 10-31-77 (Reviewable Record, p. 43).

Appellate Division Order, dated 4-14-78, entered 4-14-78 (Reviewable Record, p. 45).

Appeal to Court of Appeals, dated 4-20-78, entered 4-20-78 (Reviewable Record, p. 46).

Court of Appeals Order, dated 6-13-78, entered 6-13-78 (Reviewable Record, p. 48).

Note: */ Exparte Order retained by Judge John R. Tenney, who refused to return same and other papers to plaintiffs.

Court of Appeals Order, dated 4-29-80, entered 4-29-80 (Printed infra at p. A8).

Appeal By Leave By Court Of Appeals, dated 4-9-80, entered 4-9-80 (Printed infra at p. A11).

Appellate Division Order Denying Leave to Appeal to Court of Appeals, dated 3-28-80, entered 3-28-80, From Order of Affirmance (Stipulated Record, p. A1).

Appellate Division Order Affirming Special Term Order and Judgment on the Merits Dismissing Plaintiff's Complaint on the Merits, dated 1-11-80, entered 1-11-80 (Stipulated Record, p. A2).

Appeal to Court of Appeals by Leave of Appellate Division Denied by Appellate Division, dated 2-4-80, entered 2-4-80, From Order Affirming (see in Record to State Court of Appeals).

Special Term Order and Final Judgment Granted on Summary Judgment Dismissing Plaintiff's Complaint on the Merits, dated 5-21-79, and 5-23-79, respectfully entered 5-22-79 and 5-23-79 (Stipulated Record, pp. A10 and A12).

QUESTIONS PRESENTED

(1) At Court of First Instance. Special Term. Appellants were denied notice of Defendant's motion and affidavit of application, upon which the motion was made exparte. It was not filed in the record as required by state law and federal law, and no good cause was shown.

The federal question at that stage was: Denial of notice and hearing, which was raised by pleadings as; assignment of error to charge Defendant with default in pleading, by omission, neglect or failure to take steps required in progress of this cause.

Was not federal question substantially shown to be that Defendant's act in dispensing with judicial notice and default in pleading, was in violation of Appellant's procedural safeguards,

which have more than a deminimis impact on Appellants' Constitutional rights to due process of law?

(2) If the highest state Court where a decision to review could have been had, but refused to review. When it had previously decided the federal claim, and upon further proceedings, Plaintiffs suffered a judgment against them on the merits, dismissing their complaint as not having a cause of action. Did not lower Court's turn of refusal to amend prior appeal for permission, to serve a direct appeal as of right on Constitutional grounds, amount to a rejection of the federal claim involved, that said rejection was not an adequate independent non-federal ground to support the final denial, or judgment previously affirmed by this Court of Last Resort?

(3) Did not appeal lie either directly or by permission currently, to either State Court of Appeals, or to the U.S. Supreme Court, where the case involves a question. Whether Judgment is the result of due process?

(3) The federal question charged as: Excess in abuse of State Court's jurisdiction. Is lengthy on the facts, requiring plenary proof on the merits, with or without oral argument. But where prejudicial errors, withholding evidence, refusing to hear or act as requested, perjury, colusion of judges with attorneys. Generally, a departure from regular judicial practice for reasons other than a conviction of the cause, has resulted. If shown! And it's not legally possible for any showing on nonfederal grounds, to sustain the judgment. Should not such plenary review be had, which can give these additional reasons for resolution of this federal claim?

(4) Where Appellants have been injured by acts in excess of lower court's jurisdiction, the federal claim causing Appellants to be overly cautious in appealing, and the Last Court of Resort refused to review or amend the appeal. After further proceedings, Appellants' had a judgment to be granted against them on the merits, without regress. And now only the granting or denial of relief depends directly and ultimately upon the construction

of the Constitution. Does not this case now arise under the Constitution, Article III, Sec. 2. par. 1. Should not federal review be had, regardless of the outcome of the further proceedings, and this Court resolve the federal claim as to Defendant's default, which substantially became the federal issue?

STATEMENT OF THE CASE

Defendant's default was first raised in Federal District Court, N.D. of N.Y., Utica, N.Y., filed February 23, 1976. Civil Action 76 CV 58. Defendant nor his attorney appeared at trial on April 26, 1976, giving no excuse. On April 30, 1976, Plaintiffs filed a default affidavit on application to that Court. See Reviewable Record, p. 67. The application was never heard. On or after April 14, 1976, Plaintiffs received Defendant's notice of appearance, dated 4-14-76, on motion to Dismiss for lack of subject matter jurisdiction. See Reviewable Record, p. 66. At hearing on May 10, 1976, the Complaint was dismissed for lack of subject matter jurisdiction.

On appeal to the U.S. Court of Appeals, Second Circuit, the action was dismissed for the same reason. See Exhibit 11-11-76, infra at p. A1 as annexed. Now the Court is called on to resolve this federal question, which the state Courts refused to review and avoided, giving only presumptious reasons irrebuttable.

The federal question was further presented at Court of First Instance as: Excess in abuse of jurisdiction. Fairly comprising all federal issue matter affecting the judgment appealed from.

The initial federal question raised, namely: "Was Judgment Without Notice" raised by assignment of error on request to charge Defendant's default in pleading, made returnable at trial on 6-27-77, by Appellants' Motions served 6-7-77, Reviewable Record, p. 21; 6-17-77, Reviewable Record, p. 24; 6-20-77, Reviewable Record, p. 25; 6-23-77, Reviewable Record, p. 27, Exhibit "AA".

When defects in service of Defendant's Answers were challenged, and Appellants served the default affidavit. Where the Amended Complaint was verified, the answer must also be verified, wherein the Defendant was charged with any fraud whatever affecting Appellants' rights. See CPLR 3020(b)(c); FRCP 56(e)(g); (*Federal Schools* v. *Saponaro*, 1941, 25 N.Y.S.2d 313); also (*Application of Bingemann*, 1961, 28 Misc.2d 595, 215 N.Y.S.2d 557).

Defendant by State law could not serve two answers; but did, simultaneously. See CPLR 3011. His first answer, dated 1-31-77, was unverified. His second was amended without court leave; but did supersede his unverified answer. *But was not timely served.* See CPLR 3024(c); C.P.A. Sec. 263; C.P.A. Sec. 260. Such was his default in pleading.

The Court was entitled to an answer showing issues. (*Brooklyn Trust Co.* v. *Wheeler*, 1948, 81 N.Y.S.2d 762); also (*Walsh* v. *Gray*, 214 A.D. 296, 212 N.Y.S. 230). Upon return of the defective answer, it further triggered the defense to seek an exparte order, bringing on the further Constitutional violations under the due process clause, and a flood of federal questions.

A state Court of first instance, Special Term, Judge John R. Tenney granted Appellee an exparte Show Cause Order, dated 6-1-77, which was retained by that Judge. This Court is called on to grant an order compelling discovery of all papers retained by Judge Tenney, and especially the Show Cause Order dated 6-1-77, and upon the opposing attorney if necessary, pursuant to FRCP Rule 37.

The affidavit of application upon which the exparte motion was made, was not served upon Appellants, neither was it filed in the record, as required by state law, and federal law. See R.C.P. 88; C.P.A. Sec. 98; CPLR 215; ERCP (6)(d); Also Ruling Case Law Summaries several decisions of the Supreme Court, 21 R.C.L. 1262. "Matter of Galvin's Estate 153, Misc. 11, 274 N.Y. Supp. 846 (1934); also (*Duby* v. *Martin*, 109

N.Y.S. 2d 503 (1951); also (*Powell* v. *Schoellkopf*, 197, App. Div. 471, 188 N.Y. Supp. 297 (4th Dep't. 1921).

Afterwards, Special Term orders, dated 6-13-77, 8-8-77, flowed characteristically from that exparte motion, according to CPLR 5704(a); and Case Law: (*Application of Scotti*, 1976, 53 A.D.2d 282, 385 N.Y.S. 2d 659). Proper procedure for relief, was to request Special Term court to vacate the exparte orders, and thereafter, if denied, to appeal to the Appellate Division from the order of denial. This was done. See Reviewable Record, pp. 27, 33, 38, 39. Also (*In re Wilmark Service System, Inc.*, 1964, 21 A.D.2d 478, 251 N.Y.S.2d 267).

Thereupon, the state Court of first instance at Special Term, now was the last and highest state court where review was, and could be had. The Appellate Division, Fourth Department also refused to review, giving no opinion, but affirming on the merits. Now the final judgment is not subject to any further review by any state court, and the highest State Court of Appeals, where review could have been had, has turned on the federal question, and issue. Therefore, its designation given the final judgment is not controlling. Where prior decisions has been rendered on the federal claim. (*Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 72). State law can do no more than reveal the incidents and effects the final judgment, and judgments in its local context.

At trial on 6-27-77, day of return, Judge Edward F. McLaughlin granted Defendant an Order, dated 7-21-77, following his memorandum Decision, dated 7-14-77. See Reviewable Record, pp. 28, 29. Where shown Appellants' appeal from the Decision and Order. Also see Reviewable Record, p. 30, dated 7-18-77.

When the defense attorney and the trial judge, had knowledge of Plaintiffs' application for default judgment/or inquest. But such hearing was set aside without good cause shown. Such act on the part of the Court was prejudicial error, affecting Appellants' Constitutional rights under the due process clause,

and in violation of federal law. See FRCP 55(2)(c); FRCP 54 (c). Good cause was not shown.

Where Defendant's Opposing Affidavit, dated 7-22-77, Reviewable Record, p. 26, presented at trial, but was withheld from the record, and it failed to state that Defendant's default, was due to mistake, inadvertence, surprise, or excusable neglect. Then the proper procedure was for Defendant to ask that the default be opened, or otherwise default judgment be granted to Appellants, but not set aside. (*Bennet* v. *Dorothy Lamour, Inc.*, 1961, 13 A.D.2d 816, 216 N.Y.S.2d 306). Also (*U.S.* v. *Topeka Livestock Auction, Inc. D.C. Ind.*, 1975, 392 F. Supp. 944). Also CPLR 2221(a)(1)(2); CPLR 5015(a).

When trial court made an order, dated 7-21-77, Reviewable Record, p. 29. Compelling further pretrial procedures. But no basis was formed for leave of said order for a physical examination of Plaintiff-Patient, and the issues between parties were changed by the Court on its own. The Court erred substantially, and also by its advisement to the defense attorney, to ask for said examination, when no such request was made in Defendant's Cross Motion, dated 6-17-77. See Reviewable Record, p. 23. Wherein, the sole request made, was for hospital authorizations of Plaintiff's treating physicians, and said authorizations would have been agreed to by Appellants, without resort to leave for Court Order. By Defendant's service of a proper Notice, but not as: See Reviewable Record, p. 51a, also Brief and Appendix of Plaintiffs-Appellants to Court of Appeals, page A-24. Such notice necessitated change, by said order, dated 7-21-77, Reviewable Record, p. 29. The Court Order was further defective in subject jurisdiction, for the Defendant Doctor *did not*! serve notice pursuant to CPLR 3121, through his attorney as claimed. See Reviewable Record, p. 28.

The balance of the case centers, around the completeness of the record on appeal to Appellate Division, Fourth Department, who unanimously affirmed, or dismissed any appeal, or denied each motion. See Reviewable Record, p. 45; Also in

Brief and Appendix to State Court of Appeals, see pages A-1 and A-2; Exhibit "A2" — Page A-19; Exhibits A1, "G" and "G2" on pages A27 thru A29.

When Judge John R. Tenney constantly refused to settle the record on motions made by Appellants, and its shown, that he did render a decision on the motions involving the federal question, yet the motions were not in the record. After the Appellants' entire pleadings, which had not been copied, was left in the protection of the Trial Judge to take home to study, at the Court's request. But upon return of the pleadings by mail service, three of the Plaintiff's motions were absent from the folder, and had to be copied from the County Clerk's office for appeal, and then attached to the briefs. See Reviewable Record, p. 56.

There should be no question as to whether such practice was excessive in abuse of jurisdiction. The record was insufficient for intelligent review, which was not ordered corrected by court of first instance nor on appeal. See Brief and Appendix, of Plaintiffs-Appellants to State Court of Appeals page 6, POINT ONE; Also Exhibits pp. 32, 34, 35, 40, 43 and 43a. See (*In E.P. Reynolds, Inc.* v. *Nager Electric Company*, 1966, 17 N.Y.S.2d 51, 268 N.Y.S.2d 15, 215 N.E. 2d 339); (21 A.D. 2d 1025, 194 N.Y.S.2d 111 1); (*Monticello Mut. Building & Loan Ass'n* v. *Rapp*, 1932, 235 A.D. 304, 256 N.Y.S. 909); also (*People* v. *Foote*, 1934, 241 A.D. 846, 271 N.Y.S. 681).

Cases Further Sustaining Jurisdiction:

Goss v. *Lopez*, 42 L.Ed.2d 725, 1975;
Johnson v. *Risk*, 137, U.S. 300, 307;
Lawrence v. *State Tax Commission*, 286 U.S. 276, 282;
Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 1954, 74 S.Ct. 396, 347 U.S. 157, 98 L.Ed. 583;
Murdock v. *City of Michigan*, 20 Wall, 590, 1875;
New Orleans Waterworks v. *La. Sugar Refining Co.*, 125 U.S. 18, 1888;

Osborn v. *Bank of United States*, 1824, 9 Wheat, 738, 823, 6 L.Ed. 204;

Siler v. *Louisville & Nashville R. Co.*, 1909, 29 S.Ct. 451, 213 U.S. 175, 53 L.Ed. 753-29 S.Ct. at 454, 213 U.S. at 191 and Siler Rule 53 S. Ct. at 589, 289 U.S. at 245-246;

South Carolina Elec. & Gas Co. v. *Flemming*, 1956, 76 S.Ct. 692, 351 U.S. 901, 100 L.Ed. 1439;

Stanley v. *Illinois*, 405 U.S. 645, 1972;

Valz v. *Sheephead Bay Bungalow Corporation*, 1928, 249 NY 122, 163 N.E. 124, certiorari denied 49 S. Ct. 82, 278 U.S. 647, 73 L. Ed. 560.

Miscellaneous Opinion:

Cohen and Karger, Powers of the New York State Court of Appeals, p. 250 (rev., ed., 1952).

RULE 33 PART VIII

Pursuant to Rule 33 Part VIII, 2b, 28 U.S.C. Section 2403, it may be applicable, wherein the constitutionality of Acts of Congress affecting public interest is drawn in question and the United States nor any agency, officer or employee thereof is not a party.

To Appellants' knowledge, no court has pursuant to 28 U.S.C. Section 2403 certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

Dated: June 25, 1980.

Respectfully submitted,

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Elmwood Station
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APPENDIX

ORDER FROM UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, entered 11-11-76.

[Exhibit Page A-11-11-76]

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of November, one thousand nine hundred and seventy-six.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge.

HON. J. JOSEPH SMITH

HON. WILLIAM H. TIMBERS,

Circuit Judges.

John L. Grady & Fatima Grady, Plaintiffs-Appellants	)	
v.	)	76-7298
Dr. Roderick A. McLean, Defendant-Appellee.	)	

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued pro se.

ORDER FROM UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, entered 11-11-76.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

We cannot agree that the Food, Drug and Cosmetic Act, 21 U.S.C. §301 et seq., confers upon an injured patient a right of action against a doctor who disregards the directions on the label of an FDA approved drug. The Act, which primarily regulates the introduction of food and drugs into interstate commerce, has an underlying philosophy of disclosure. Since information concerning drugs often cannot be made immediately intelligible to the patient, the Administration recognizes the important role of the physician in providing this intelligence to his patients. The essential purpose of labeling, therefore, is not to impose a standard of care on the doctor, but to make available "a balanced discussion of the effectiveness and the risks attendant upon the use of oral contraceptives..." 21 C.F.R. §310.50(a)(3).

We are, in addition, mindful that the doctor-patient relationship is a highly sensitive one, and traditionally a matter of state concern. It cannot be lightly inferred that Congress intended to invade it in enacting the Food, Drug and Cosmetic Act. Cf. Cort v. Ash, 422 U.S. 66, 84 (1975). We do not find any valid reason for holding possible state malpractice claims preempted by this federal legislation.

Since we fail to discern any basis for federal subject matter jurisdiction, we affirm. We believe that Mr. and Mrs. Grady would be well advised to seek

the aid of counsel as Judge Port suggested, for there still remains for consideration whether a state court action would be timely or appropriate.

s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN

s/ J. JOSEPH SMITH
J. JOSEPH SMITH

s/ WILLIAM H. TIMBERS
WILLIAM H. TIMBERS

United States Court of Appeals
FILED
NOV 11 1976
A. Daniel Fusaro, Clerk
Second Circuit

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT FROM FINAL JUDGMENT, Received on 6-3-80 at State Court of Appeals, Albany, New York.

JOHN L. GRADY et., and FATIMA GRADY Appellants Pro se	Civil Action
- v - RODERICK A. McLEAN, M.D., Appellee	Joint Notice of Appeal Index No. 894/77

Notice is hereby given that John L. Grady and Fatima Grady, Appellants Pro se in the above entitled action. Hereby appeal to the Supreme Court of the United States, from a Final Judgement in the New York State Court of Appeals.

Said Order is entered in the office of the Clerk, Court of Appeals Hall in the City of Albany on the twenty-ninth day of April A. D. 1980. Denying permission to appeal to the Court of Appeals, and denying an amendment for extension of time to appeal as of right under state statute CPLR 5601(b) 1., where a U. S. Constitutional question is involved.

Appeal to this Court is taken under Article 3, Section 2, par. 1., and pursuant to the 5th, and 14th, Amendments Section 1., as pertains to Due Process of Law, Article 6, Section 2. Where review may be granted as set forth in 28 USC Section 2357 1).

Dated: May 30, 1980.

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT FROM FINAL JUDGMENT, Received on 6-3-80 at State Court of Appeals, Albany, New York.

Respectfully,

s/ JOHN L. GRADY FATIMA GRADY

John L. Grady & Fatima Grady
Appellants
P.O. Box 27 Elmwood Station
Syracuse, New York 13207
458-5500 X3238

c.c. Joseph W. Bellacosa
Clerk of the Court of Appeals
Albany, New York 12207

Martin, Ganotis & Brown
Attorneys for Appellee
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

RECEIVED
JUN 2 - 1980
Office of the Clerk
Supreme Court, U.S.

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980
No. 894/77

JOHN L. GRADY et., and FATIMA GRADY -
APPELLANTS

- v -

RODERICK A. McLEAN, M.D., - APPELLEE

Affidavit of Service

State of New York)
County of Onondaga)
City of Syracuse) SS.:

JOHN L. GRADY, being duly affirm deposes and says:

1. That he is one of the Appellants in the above entitled action, acting pro se at law.

2. That on May 30, 1980, he did serve a Notice of Joint Appeal with proof of service on the Appellee's Attorney, to the New York State Court of Appeals Clerk's office, from a final judgement entered in that office on April 29th, 1980, and a letter requesting that court to prepare the record and transmit it to the Clerk's office of the United States Supreme Court.

3. That also on May 30th, 1980, that he did serve the identical copied papers above named, on Defendant's Attorney Office at 499 South Warren Street, Syracuse, N.Y. 13202, the address given for that purpose. All by Certified mail enclosed in a post-paid enveloped.

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT.

Dated: May 30, 1980.

Respectfully,

s/ JOHN L. GRADY

John L. Grady Appellant Pro se
P. O. Box 27 Elmwood Station
Syracuse, New York 13207
458-5500 3238

Affirmed to Before me this 30th, Day of May, 1980.

s/ RAYMOND P. PROWAK

Raymond P. Prowak, Notary Public in the State of New York, Onondaga County, No. 34-3168015
My Commission Expires March 30, 1981

c. c. Martin, Ganotis & Brown
Attorneys for Appellee
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

ORDER APPEALED FROM, entered 4-29-80.

[Exhibit Page A-3]

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of April A. D. 1980

PRESENT, Hon. Lawrence H. Cooke, Chief Judge, presiding.

---

4 Mo. No. 456
John L. Grady and Fatima Grady,
Appellants,

vs.

Roderick A. McLean, M. D.,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

RECEIVED
MAY 13 1980
COURT OF APPEALS

STATE COURT OF APPEALS – CLERK'S OPINION, dated 5-15-80.

[Exhibit Page A-10]

STATE OF NEW YORK
COURT OF APPEALS

Joseph W. Bellacosa
Clerk of the Court

Clerk's Office
Albany 12207

May 15, 1980

Mr. John L. Grady
P.O. Box 27
Elmwood Station
Syracuse, New York 13207

RE: Grady v. McLean

Dear Mr. Grady:

Section 5514(a) of the CPLR provides an automatic extension of the time within which to take an appeal as of right when a motion for leave to appeal has been denied or dismissed. This presumes, of course, that the order from which the appeal is to be taken is in fact an appealable order within the meaning of CPLR 5601.

CPLR 5514(a) is self-explanatory and self-executing. Your motion for such an extension is therefore a nullity upon which no further action will be taken.

STATE COURT OF APPEALS – CLERK'S OPINION, dated 5-15-80.

Your papers are returned herewith.

Very truly yours,

s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa

JG:tab
Enc.
cc: Martin, Ganotis, & Brown, Esqs.

APPEAL BY LEAVE TO COURT OF APPEALS,
dated 4-9-80, entered 4-9-80.

[Exhibit Page A-5]

COURT OF APPEALS
OF THE STATE OF NEW YORK

JOHN L. GRADY and FATIMA GRADY
Plaintiffs-Appellants,

- against -

RODERICK A. McLEAN, M.D.,
Defendant-Respondent.

Notice Of Motion For Leave
To Appeal

Index No. 894/77

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of John L. Grady and Fatima Grady, affirmed to the 9th, day of April, 1980, the reviewable original record, exhibit "AA", on appeal in the Appellate Division, Fourth Department, from the Order and Final Judgement of the Supreme Court, Onondaga County, entered in the office of the Clerk, Onondaga County, on May 22, and 23, 1979, respectfully, dismissing Plaintiffs-Appellant's amended complaint on the merits, the notice of entry thereof, the unanimous order of The Appellate Division, Fourth Department, without opinion, affirming said order and final judgement on the merits respectfully, entered in the office of the Clerk, Onondaga County, the order of affirmance entered on January 1, 1980, in the office of the Clerk, Monroe County, the notice of entry thereof, the order of said Appellate Division, Fourth Department, entered in the office of the Clerk of said Appellate Division, Fourth Department, on March 28, 1980,

APPEAL BY LEAVE TO COURT OF APPEALS,
dated 4-9-80, entered 4-9-80.

denying the motion of Plaintiffs-Appellants for re-argument or, in the alternative, for leave to appeal to the Court of Appeals from said order of unanimous affirmance, the notice of entry thereof and the brief of Plaintiffs-Appellants submitted herewith, and upon all the proceedings heretofore had herein, the undersigned will move this Court at a stated term thereof, appointed to at the Court House of the Court of Appeals in the City of Albany, State of New York thereof, at least 8 days, and not more than 15 days, after notice of motion is served, unless there is no motion day during that period, in which case at the first motion day thereafter as Appellants can be heard, for an order allowing an appeal to be taken herein by Plaintiffs-Appellants in this Court from said order of unanimous affirmance, pursuant to CPLR 5602(a)(1)(i)(ii)(b)(ii), and for such other and further relief in the premises as may be just and proper.

s/ JOHN L. GRADY
John L. Grady

APPEAL BY LEAVE TO COURT OF APPEALS,
dated 4-9-80, entered 4-9-80.

COURT OF APPEALS
OF THE STATE OF NEW YORK

JOHN L. GRADY and FATIMA GRADY
Plaintiffs-Appellants

- against -

RODERICK A. McLEAN, M.D.,
Defendant-Respondent

Affidavit in Support of Motion for Leave To Appeal

State Of New York)
County of Onondaga) SS.:

John L. Grady and Fatima Grady, being duly affirmed, deposes and says:

1. We are the Plaintiffs-Appellants in the above entitled action, and we are familiar with all the facts and circumstances, pleadings and proceedings heretofore had herein.

2. This is a motion, pursuant to CPLR 5602 (a)(1)(i)(ii)(b)(ii), for leave to appeal to the Court of Appeals after refusal of the Appellate Division, Fourth Department, to grant reargument or in the alternative, to grant leave to appeal to the Court of Appeals.

3. This is an action to recover damages caused by Defendant's professional negligence.

4. The Plaintiffs-Appellants pro se, commenced this action on December 14, 1976, and served an amended complaint on January 14, 1977. The Defendant-Respondent moved to dismiss, which was a motion for Summary Judgement was granted by order dated, May 22nd, 1979, and Final Judgement entered on May 23rd, 1979, respectfully. The Plaintiffs-

APPEAL BY LEAVE TO COURT OF APPEALS, dated 4-9-80, entered 4-9-80.

Appellants then appealed from said order and judgement, to the Appellate Division, Fourth Department. By order of the Appellate Division, Fourth Department, dated, and filed January 11, 1980, the order of dismissal at Special Term was unanimously affirmed without opinion. Said order of unanimous affirmance was entered in the office of the Clerk of the County of Monroe on January 11, 1980, and a copy thereof with notice of entry was served on Plaintiffs-Appellants on January 16, 1980. Said order is a final order.

5. By motion returnable before said Appellate Division Fourth Department, on February 4th, 1980, the Plaintiffs-Appellants applied to said Court for an order granting a reargument of the appeal to said Court or, in the alternative, for an order allowing the Plaintiffs-Appellants to appeal to the Court of Appeals from said order of unanimous affirmance and stating that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals. Said motion was in all respects denied by the Appellate Division by order entered in the office of the Clerk of said Court on March 28, 1980, a copy with notice of entry thereof was served upon the attorneys for the Plaintiffs-Appellants on March 28, 1980.

6. Opinion was made by Judge at trial, on 6-27-77, that he had to refer Plaintiff's motion to vacate to Judge who ruled on said order. See exhibits (3) & (4), p. 53 & 54. Judge hearing summary judgement, motion said he saw no basis for vacating his previous order. See exhibit(5) on page 55, and in open Court, this Judge said; "That the part, section two of the original reviewable record would only complicate the appeal." This same Judge said that the doctor found

that there was an infection, and treated it with cauterization. See the Brief and Appendix of Plaintiffs-Appellant's Judge's Decision dated, May 10, 1979, p. A-13.

7. The record of said appeal to said Appellate Division, Fourth Department, its order of unanimous affirmance and its order denying Plaintiffs-Appellant's said motion for reargument, or in the alternative for relief to appeal to this Court, copies of all of which are in the possession of the Plaintiffs-Appellant's, except those left with the Court at pre-trial on 6-6-77, which are requested by Plaintiffs-Appellants to be served on this Court by the lower Court, are hereby made part hereof.

8. It is significant that the Court below, has been silent (mum), concerning the reviewable record/or its review, being Certified by the Clerk of the County Court, Onondaga County.

9. A previous motion has been made in this Court for permission to appeal to the Court of Appeals.

For reasons which appear in the brief hereto attached, deponent respectfully asks that leave to appeal to the Court of Appeals be granted, in accordance

APPEAL BY LEAVE TO COURT OF APPEALS, dated 4-9-80, entered 4-9-80.

with the provisions of CPLR 5602(a), in the interest of substantial justice.

s/JOHN L. GRADY FATIMA GRADY
John L. Grady & Fatima Grady Pro se
Plaintiffs-Appellants

Affirm to Before me this 9th day of
April, 1980

s/MAUREEN A. PECK
Maureen A. Peck
Notary Public in the State of New York
Qualified in Onon. Co. No. (illegible)
My Commission Expires on March 30, 1981.

BRIEF AND SUPPLEMENTAL APPENDIX

TO

JURISDICTIONAL STATEMENT

Pursuant to Rule 16*5. Appellants are filing this supplemental brief while the jurisdictional statement is pending calling attention to new cases of other intervening matter not available at time of last printing preparation of filing.

Whereupon pursuant to Rule 53, Part IX. Special Proceedings in Forma Pauperis accompanied by proof of service as prescribed by Rule 33, and Appellant's Motion for Leave so to proceed, together with the affidavit setting forth facts showing that Appellants comes within the statutory requirement of 28 U.S.C. Sec. 1915, expressly permitting by Rule 53, for filing one copy, of all papers to be presented to the Court without being printed.

Thereupon, typewritten papers 8½ X 13 inches in complaince with Rule 47, may be served.

Wherein citation of the U.S. Constitutional Provision as provided by Rule 15 (v), can be contained herein.

John L. Grady Appellant Pro se
P.O. Box 27 Elmwood Station
Syracuse, New York 13207

PAGE

Relevant Docket Enteries In Further Proceedings Below:

Order appealed from Entered 4-29-80..... A-1

Appeal to U.S. Supreme Court Served 5-30-80 ..... A-2

Order from App. Div. Denying leave to appeal to the State Ct. of Appeals Entered 3-28-80..... A-3

Motion to App. Div. for leave to appeal to the State Court of Appeals Served 2-4-80..... A-4

Order from App. Div. Unanimously Affirming Special Term's order granting Summary Judgement to Defendant Entered 1-11-80..... A-5

Order from Special Term granting Summary Judgement to Defendant on grounds that complaint does not state a cause of action Entered 5-22-79..... A-6

Final Judgement from Special Term Dismissing Appellant's complaints on the merits Entered 5-23-79..... A-7

Notice of Appeal to App. Div. from Special Term's Final Judgement and Order Served 6-4-79..... A-8

Relevant Prior Pleadings, Charge, Findings & Opinions Invoking Court's Jurisdiction:

Order of the State Court of Appeals which turned on the Federal Question Entered 6-13-78..... A-9

Appeal to State Court of Appeals from order of App. Div. Served 4-29-78-Order appealed from was a Unanimous Affirmance of Special Term's order defective in jurisdiction was dated 7-21-77 A-10

Appellate Division Order Deciding the Federal Question Entered 4-14-78..... A-11

Cross Motion by Appellants showing presentation of the Federal Question at App. Div. level Dated 10-28-77..... A-12

Cross Motion by Appellants showing further presentation of the Federal Question at the App, Div. level Served 9-13-77..... A-13

Motion by Appellants for settlement of the record to Trial Justice Served 9-1-77..... A-14

Order from Trial Term With-holding evidence Dated 10-5-77..... A-15

Appeal to App. Div. from Special Trial Term Order on Settlement of the record-Appela not obviated Served 10-31-77..... A-16

Trial Judge's Memorandum Decision Dated 7-14-77..... A-17

Trial Term Judge's Order striking Plaintiff's Note of issue and Statement of readiness Dated 7-21-77..... A-18

Appeal to App. Div from Trial Term Order, Appeal Served 7-18-77 A-19

Exparte Characterized Order from Special Term Deciding the Federal Question Entered 8-16-77 Dated 8-8-77..... A-20

Appeal from Exparte Order made Original appeal Served 8-29-77.. A-21

Appellate Division Order Denying Appellant's Cross Motion to charge the Federal Question as Default Entered 9-23-77..... A-22

Appeal to State Court of Appeals from order denying to charge appeal Served 9-28-77..... A-23

TABLE OF CONTENTS

PAGE

Order from State Court of Appeals Dismissing Appellant's appeal involving the Federal Question Entered 11-21-77..... A-24

Relevant Prior Pleadings, Charge, Findings & Opinions Invoking Court's Jurisdiction:

Appellee's attorney's letter Dated, August 2, 1977, is conclusive evidence, Special Trial Term Court with-held Appellant's original pleadings from the record on appeal, that was left in the protection of the Court, at the Court's request. The pleadings and papers had not been copied by Appellants, but was later attached to their brief on appeal to the Supreme Court of New York, Appellate Division, Fourth Department..... A-25

Exparte characterized order dated, 6-13-77 Entered 6-16-77 from Special Term State Court was Judge's first ruling on the Federal Question claimed as; " Court's failure to charge, Appellee's failure to take steps required, on acts in excess and abuse of court's jurisdiction. Raised at trial by assignment of error. A-26

Notice of Motion for Relief shows that the Federal Question by order dated, 8-8-77 p. A-20 herein. See p.-2- par. 8&10 of this motion dated and served 6-23-77..... A-27

Default affidavit was sought on application in the U.S. District Court Utica, N.Y. Served 4-30-76..... A-28

Clerk of the State Court of Appeals dated 5-2-78 was his prior determination that the Federal Question was not substantial..... A-29

The pertinent text of the United States Constitutional Provisional citation..... A-30

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth *day of* April *A. D. 19*80

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

4 Mo. No. 456
John L. Grady and Fatima Grady,
Appellants,
vs.
Roderick A. McLean, M.D.,
Respondent.

RECEIVED
MAY 27 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Clerk of the Court

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

JOHN L. GRADY et., and FATIMA GRADY — Civil Action
Appellants Pro se

- v -

RODERICK A. McLEAN, M.D., — Joint Notice of Appeal
Index No. 894/77
Appellee

Notice is hereby given that John L. Grady and Fatima Grady, Appellants Pro se in the above entitled action. Hereby appeal to the Supreme Court of the United States, from a Final Judgement in the New York State Court of Appeals.

Said Order is entered in the office of the Clerk, Court of Appeals Hall in the City of Albany on the twenty-ninth day of April A.D. 1980. Denying permission to appeal to the Court of Appeals, and denying an amendment for extension of time to appeal as of right under state statute CPLR 5601(b) 1., where a U.S. Constitutional question is involved.

Appeal to this Court is taken under Article 3, Section 2, par. 1., and pursuant to the 5th, and 14th, Amendments Section 1., as pertains to Due Process of Law, Article 6, Section 2. Where review may be granted as set forth in 28 USC Section 1257 1).

Dated: May 30, 1980.

Respectfully, John L Grady Fatima Grady

John L. Grady & Fatima Grady Appellants
P.O. Box 27 Elmwood Station
Syracuse, New York 13207
458-5500 X3238

c.c. Joseph W. Bellacosa
Clerk of the Court of Appeals
Albany, New York 12207

Martin, Ganotis & Brown
Attorneys for Appellee
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

Affirmed to Before

Form 4. DAILY RECORD CORP.

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: CARDAMONE, J.P., HANCOCK, SCHNEPP, CALLAHAN, MOULE, JJ.

John L. Grady and Fatima Grady, Appellants

v.

Roderick A. McLean, M.D., Respondent.

EXHIBIT PAGE A-3

App. Div. Order Denying Leave To Appeal To Court Of Appeals Giving No Opinion After Deciding The Federal Issue.

The above named John J. Grady and Fatima Grady, appellants having duly moved before this Court for an order granting leave to appeal to the Court of Appeals from the order of this Court, entered January 11, 1980

Now, after reading and filing the affidavit of John L. Grady and Fatima Grady sworn to February 4, 1980, the notice of said motion, together with proof of due service thereof upon counsel for the opposing party, the opposing affidavit of James G. Ganotis sworn to February 12, 1980 and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be, and the same hereby is denied.

Entered: MAR 28 1980

MARY F. ZOLLER, *Clerk*

Notice Of Motion To App. Division From Order Of Denial To Appeal To The Court Of Appeals.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FOURTH DEPARTMENT

JOHN L. GRADY and FATIMA GRADY
Plaintiffs-Appellants,
- v -
RODERICK A. McLEAN, M.D.,
Defendant-Respondent.

Notice Of Motion
Index No. 894/77

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of John L. Grady and Fatima Grady in the above entitled action affirmed to this 4th, Day of February, 1980, the order of the Supreme Court, Special Term, entered in the office of the Clerk of the Clerk of the County of Onondaga, on May 22, & 23, 1979, respectfully, the order of the Appellate Division, Fourth Department unanimously affirming said order and entered in the office of the Clerk of the Appellate Division, Fourth Department on January 11, 1980, the record on appeal, and the reviewable record to said Appellate Division, and upon the briefs filed therein, and upon all papers, pleadings and exhibits and proceedings herein, the Plaintiffs-Appellants will move at term of the Appellate Division of the Supreme Court, Fourth Department, to be held at the Courthouse thereof, at least 8 days, and not more than 15 days, after notice of motion is served, unless there is no motion day during that period, in which case at the first motion day thereafter as Appellants Pro se can be heard, and for an order granting leave to Plaintiffs-Appellants to appeal to the Court of Appeals from said order of affirmance of the Appellate Division, pursuant to CPLR 5602 (a)(1)(i)(ii), upon the ground that this is a cause of novel impression, and of public interest in many aspects, and for such other and further relief such as excess in abuse of lower court's jurisdiction, and further relief as the Court may deem just and proper.

Dated, February 4, 1980.

Respectfully John L. Grady Fatima Grady

John L. Grady & Fatima Grady
P.O. Box 27, Elmwood Station
Syracuse, New York 13207
458-5500 X3238 Emergency Calls

Martin, Ganotis & Brown
Attorneys for Respondent
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

Maureen O. Peck

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FOURTH DEPARTMENT

JOHN L. GRADY and FATIMA GRADY
Plaintiffs-Appellants
--against--
RODERICK A. McLEAN, M.D.,
Defendant-Respondent.

Affidavit in Support of Motion in Appellate Division for Leave to Appeal to Court of Appeals From Order of Appellate Division Finally Determining Action

State Of New York)
County Of Onondaga) SS.:

John L. Grady and Fatima Grady, being duly affirmed, deposes and says:

We are the Plaintiffs-Appellants Pro se acting herein at law, and make this affidavit in support of the motion for leave to appeal to the Court of Appeals from the decision of affirmance of this Court.

Initially this action was brought in the Federal District Court at Utica, New York for the same cause, and in the Supreme Court, Onondaga County, to recover damages caused by the professional negligence of defendant.

The defendant with his attorney, moved on Summary Judgement Motion pursuant to Rule 3212 of the Civil Practice Law Rules, upon the grounds that plaintiffs failed to raise a triable issue of fact, and upon order and judgement granting said defendant's motion, that was entered on May 22, & 23, 1979, respectfully.

Plaintiffs-Appellants duly appealed from said order and final judgement to this Court which unanimously affirmed the order and judgement, of the court below by order dated, January 11, 1980. A copy of said order of affirmance, without any further memorandum of this court upon which it is based.

That defendant duly served a copy of said order of affirmance with notice of entry on the plaintiffs-appellants, on January 16, 1980, and this motion is made within thirty (30) days after said service.

I respectfully and most earnestly must say to the Court that this is a case with unique law and law-facts, and that there are no published decisions in any of the States of the United States based on the

same cause in law and facts as far as diligent research was able to ascertain. It most certainly is a case of novel impression in this state. This is obvious from defendant's brief statement of facts, being unable to point to a single decision in this state, or, for that matter, in any other state, which would have similar law and facts to these herein presented.

The precise questions of law sought to be reargued, or, in the alternate, to be brought up for review to the Court of Appeals, could be formulated as follows:

Where final judgement in this Court failed to make known, whether it reviewed, as requested, non-final order dated, October 5, 1977, or the original reviewable certified record, Exhibit "AA", and Exhibit "E", order that was a prior appellate phase appeal not obviated, do to delay caused by defendant's attorney's failure to comply with Rule 1000.5(c)(2). See Appellant's Reply Brief to this Court, Exhibits III p. 10. Plaintiffs waited for defendant's brief until the near end of the six months, required by Rule 1000.3(b).

No dismissal motion was made by the other side, as required by Rule 1000.3, giving this Court jurisdiction of the cause.

Plaintiff's appeal from the order on settlement of the original record, was dated October 31, 1977, See Exhibit "F".

(a) Would reversal of this order dated, 10-5-77, require a reversal or modification of this Court's determination, where there was no further opportunity during trial at Special Term on June 27, 1977, to raise this issue was given?

(b) Do this order necessarily affect the final judgement?

Where the reviewable record, Exhibit "AA", was previously filed with the Clerk of the Appellate Division, must have been determined by stipulation of parties, or by appropriate settlement before the court of original jurisdiction. Rule 1000.5(a)(3). But where this Court was bound by the certified record on appeal, and where the Court of Appeals Rule 500.3, states that correction of the record or original file and appendix, and additional papers, can be authenticated otherwise pursuant to CPLR 2105. See Exhibit "G". Also see the case of (Smith v. Slimak, 1926, 215 A.D. 637, 214 N.Y.S. 386.). Also "G2".

(c) Do a conflict of interest arise between this Court Rule, and the Court of Appeals Rule?

(d) Do a conflict of interest arise between this Court's rule, or

either the Court of Appeal's rule, and the case of; (Smith v. Slimak) Supra.?

(c) Should the reviewable certified record, exhibit "AA", filed on appeal with the Clerk's office, have been reviewed by this Court as requested?

Such questions of law undetermined, becomes a conflict of interest, evoking judicial notice of a need for substitution of a new obligation, for determination by the Judicial Council, through it's revision of the Court of Appeals, designed to overcome specific defects.

In the prior appellate phase of this action, this Court made a non-final order entered on, April 14, 1978, unanimously affirming lower Special Term order dated, July 21, 1977, which was made subsequent to Judge's Memorandum Decision dated, July 14, 1977. Appeal was taken on July 18, 1977. The order was precluded from appeal to the Court of Appeals lacking finality. In the reviewable record see pages, 28, 30 & 45.

Order dated, 7-21-77, was made upon defendant's Cross Motion dated, June 17, 1977, p.23. In order to show this Court it's misapprehensions for approving this order. All previous evidence bringing about this final judgement on the merits, evidence that was not known or was overlooked must be reviewed.

To begin with, Judge John R. Tenney granted defendant's attorney an exparte Show Cause Order dated, June 1, 1977, p.22, first line. It was answered on June 4, 1977, P.20, lines 9-10-11. And was heard at Pre-Trial on June 6, 1977, p.30, Point 2., also see 16 Rep N.Y. Judicial Council 81 (1950); 17 Rep. Id. 42 (1961); 20 Rep. Id. (1954) Also see; Clifford H. Searl, What of Pre-Trial, 4 Syracuse, L. Rev. 1 (1952).

Afterwards, on June 7, 1977, plaintiffs served an affidavit of default, that was notarized by the Clerk of the Supreme Court, Mr. Harry Fluke, on June 7, 1977, made returnable on June 27, 1977, p.21. Also see(Bell v. Poly-Seal Corp., 1962, 34 Misc. 2d 1054, 231 N.Y.S. 2d 419.). Following on June 16, 1977, a court order dated, June 13, 1977, was served on plaintiffs of defendant's answer that was a default in pleading, compelling plaintiffs to accept the answer. Following on June 17, 1977, 20th, and 23rd, respectfully, three additional motions were served on defendant's attorneys: A further default affidavit, a notice of motion for a protective order, and an affidavit in support of relief from order of compellment. See pages 23 to 27,

in the reviewable record. Also (Rochester Sav. Bank v. Monroe County, 1939 169 Misc. 526, 8 N.Y.S. 2d 107).

Afterwards, on or after June 17, 1977, the defense served a Cross Motion dated, June 17, 1977, followed by an affidavit in opposition to the default entry. It was dated, June 22, 1977. See pages 23, & 26.

At trial on June 27, 1977. Judge Edward F. McLaughlin refused to open or hear defendant's defaults in pleading. But instead, referred all of the plaintiff's motions to Judge John R. Tenney in Utica, New York, but retained the Protective Order request, p. 25. All of the plaintiff's original pleadings, exhibits, orders, and disclosure papers were given to Judge McLaughlin at his request to take home to Rome, New York for his study of this case. Please see exhibits (1) to (7), in the reviewable record, last page. Also see exhibit "G".

It must be emphasized that review on this Motion for Leave to appeal, will certainly further the interest of justice substantially as provided by CPA Section 588.

Now upon return of the plaintiff's pleadings left in the court's protection, three of the motions were missing, except the protective order, p. 25. Upon August 2, 1977, after plaintiffs had appealed, the other three original motions appeared, p. 56, exhibit (6). The order spoken of in that letter, was Judge John R. Tenney's order dated, August 8, 1977, on his rulings of the three missing motions, denying in every respect to hear or vacate his previous order dated, June 13, 1977, that was exparte characterized, compelling plaintiffs to accept defendant's defaults in pleading. See p. 55, exhibit (5), in reviewable record. Also see p. 26, within that motion, see p.3., par. 9., also see Plaintiffs-Appellants Reply Brief to this Court, p. 16, exhibits, par. 9., attorney's statement was made in affect to mislead this Court. In that he knew, that plaintiff's had served the initial default affidavit, noticed on June 8, 1977. See p. 26.

Herein is shown why appellants attached their three motions to their brief, on appeal dated, 7-18-77. By the time plaintiffs had decided to wait no longer on the missing motions to turnup, after trial on June 27, 1977. Suddently! Upon reception of exhibit(6), p. 56, after having not copied their original motion papers, they rushed to the County Clerk's office, got copies, and attached them to their brief.

Afterward, plaintiffs received the Trial Term's Memorandum Decision dated, July 14, 1977, followed by Order of the Court dated, July 21, 1977. See pages 28, 29 & 30. The order being made in accordance to Judge's Memorandum Decision, now rest upon unsubstantial evidence, where it states in the decision. " That defendant through his attorneys served a notice pursuant to CPLR 3121. " Was a false statement or ruling, which cannot be found in the pleadings nor the record. And further,

Where disclosure pursuant to CPLR 3102 (b), shall be obtained either by stipulation, or notice without leave of the Court. But where Trial Term's Order dated 7-21-77, was made upon defendant's Cross Notice of Motion dated, 6-17-77, p. 23, and the sole request in that motion as can be read, was made only for plaintiff's hospital authorizations of her treating physicians, and nothing else can be read to show that second request, but only to strike plaintiff's note of issue and statement of readiness. p. 16, defendant's first cross notice of motion dated, 4-29-77, where before no request for pre-trial examinations were requested. Also see p. 23.

But in any event no proper basis was formed for leave of the court order for disclosure, where no exceptions are noted, nor stipulation, nor necessary circumstances warranting leave of the Court for an order, where pursuant to CPLR 3124, to compell disclosure which could have been sought by mere notice, have been denied. See (e.g., Schreter v. Brumer, New York Law Journal, October 16, 1963 p. 18 col. 7 (Sup. ct. Queens County, per Herz, J.). Also see p. 16, The Judge's decision within this order in substance has commited prejudicial error. Court had no jurisdiction to grant order dated, 7-21-77 striking plaintiff's note of issue and statement of readiness, merely for his directing pretrial procedure, where no explanation for failure to take all desired pretrial procedures before plaintiffs filing of note of issue & statement of readiness, and no special circumstance were indicated, was improvident exercise of discretion. See (St. George v, Dennis, 1977, 57 A.D. 2d 733, 395 N.Y.S. 2d 790). See defendant's waiver. (Rose v. Package Machinery Co., 1975, 47 A.D. 2d 999, 366 N.Y.S. 2d 746.).

Specific Questions Relative To This Court's Affirmation Of Lower Court Order dated, 7-21-77:

(f) Do order dated, 7-21-77, affect the final judgement or determination?

(g) Was order dated, 7-21-77, at Trial Term correctly made?

(h) Did defendant's delay in seeking further pre-trial examinations operate to plaintiff's disadvantage?

(i) Following filing of plaintiff's note of issue and statement of readiness, what substantial evidence in support of order dated, 7-21-77, can be read in the Cross Motion request dated, 6-17-77, if any. Where only a request for plaintiff's hospital authorizations were requested, and no special circumstances were or could be indicated?

Specific Questions Upon Review Of Exparte Order; Dated 6-1-77:

(j) Where exparte characterized order dated, 6-13-77, was granted to defendant, but, was not made on notice, and plaintiff's motion for relief, was not made on notice to judge who ruled at pre-trial on 6-6-77, but was made on notice to judge at Special Trial Term on 6-27-77, but refused to hear or vacate it. In accordance with CPLR 2221 1., & 2., Did judge refusing to hear at Special Trial the plaintiff's other three motions, and defendant's defaults in pleading commit a reversible error?

(k) Did judge one at pre-trial hearing, commit a reversible error in granting defendant an exparte order, where no good cause was or can be shown in the record? See (Randolph v. Jacobs, 1959, 20 Misc. 2d 310, 197 N.Y.S. 2d 780).

(l) Did defendant default at pre-trial for his non appearance?

Specific Questions Upon Review Of Summary Judgement:

(m) Where motion was made by plaintiffs for settlement of the record at Special Term on October 1, 1979, and the record was not settle as requested in that affidavit. See exhibit "G". But was stipulated by parties because the judge refused to obey the requset. Was such improvident exercise of discretion? See the motion exhibit dated, September 18, 1979.

(n) Where judge's decision dated, May 10, 1979. See p. A-13, in the stipulated record appendix). He stated: " That upon his best discernment(judgement), plaintiff was complainting of a female disorder, that the doctor found was infection and treated it with cauterization, that apparently,the treatment was insufficient to cure the underlying condition, which appeared to be a form of gonorrhea. " Did plaintiff's complaint state a cause of action in medical malpractice or professional negligence?

(o) Did plaintiff's complaint state a cause of action in misrepre-

sentation, fraud or deceit?

(p) Did plaintiff's complaint state a good cause of action which is recoverable under any form of law?

(q) Did the lower Court at Special Term during its proceedings relative to settlement of the prior record on appeal to this Court, or on its rulings, orders, judgements, or facts determined, as perceived by the Appellate Division, commit excess in abuse of its jurisdiction in this case?

(r) Was this Court's prior affirmances of orders entered, on 4-14-78, and on 1-11-80, without opinion, of orders made at Special Term in this action, an approval of the results reached, or was it on the lower Court's reasonong or its basis thereof? If on approval alone, upon what state of facts was the approval determined?

It is not proper to dismiss a complaint for insufficiency of the pleading on a motion for Summary Judgement. (Perlman & Wortmann, Inc. v. Yonkers Contracting Co., 1960, 12 A.D. 2d 599, 208 N.Y.S. 2d 468.). The proper method of challenging a pleading as a matter of law is by direct attack upon the complaint or any cause of action pleaded and not by motion for Summary Judgement. (Mirski v. Essex Shirt Co., 1957, 8 Misc. 2d 715, 168 N.Y.S. 2d 238.).

Dismissal of a complaint on ground that it fails to state a cause of action is not a dismissal on the merits. (Mayes v. Harnischfeger Corp., 1969, 60 Misc. 2d 308, N.Y.S. 2d 658).

Since this is a novel case bearing upon public interest. We request and respectfully ask for leave to appeal

With Respect,

John L. Grady Fatima Grady

John L. Grady & Fatima Grady
Plaintiffs-Appellants Pro se
P.O. Box 27, Elmwood Station
Syracuse, New York 13207

To: Clerk's Office
Supreme Court-State of
New York, Appellate Division
Fourth Department
Rochester, New York

Martin, Ganotis & Brown
Attorneys for Defendant
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

Affirmed to Before me this 4th, Day of February 1980.

Maurice J. Peck

81

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FOURTH DEPARTMENT

JOHN L. GRADY and FATIMA GRADY

Plaintiffs-Appellants,

- v -

RODERICK A. McLEAN, M.D.,

Defendant-Respondent.

AFFIDAVIT
Proof Of Service
Via U.S.
Mail

Index No. 894/77.

State Of New York)
County Of Onondaga) SS.:

JOHN L. GRADY, being duly affirmed deposes and says:

1. That he is one of the Plaintiffs-Appellants in the above entitled action, acting at law Pro se.

2. That on February 4, 1980, he did serve a notice of motion and affidavit in support of motion in the Appellate Division for Leave to appeal to Court of Appeals from order of Appellate Division Finally Determining the action. Enclosed with the motion papers are exhibits marked as: "1", Final Order entered, on 1-11-80; "2", Prior appellate Order entered, 4-14-78; "3", Order dated 9-14-79, Dismissal of motion for Show Cause Order; A, Notice of Motion to Settle the Original Record; A1, Certification of reviewable record pursuant to CPLR 2105; "A2", Notice of Motion for Show Cause Order dated, 8-21-79; B, Notice of Motion seeking settlement of original record, dated, 9-1-77; C, Affidavit Notice of Motion dated, 8-12-77, Demand for missing pleadings; D, Attorney's correspondence dated, 8-25-77, showing service and reception of court ordered medical authorizations; "E", Order Settling the record dated, 10-5-77; "F", Notice of appeal dated, 10-31-77;"G2", Plaintiff's certification pursuant to CPLR 2105, dated, 2-4-80; P-22, Court order dated, 6-13-77; P.23, Prior appellate phase Order to this this Court dated, 7-21-77; P.28, Memorandum Decision dated, 7-14-77; exhibit 8-8-77, Court Order dated, 8-8-77, Superseding order dated, 6-13-77.

That all of the aforesaid papers were served with this motion by certified mail upon the office of defendant's attorneys at 499 South Warren Street, Syracuse, New York 13202. Include exhibit "G",9-18-79.

Dated, February 4, 1980.

John L. Grady
John L,. Grady Plaintiff-Appellant
P.O. Box 27, Elmwood Station
Syracuse, New York 13207
458-5500 X 3238

Martin, Ganotis & Brown
Attorneys for Defendant
Office & P.O. Address
499 So. Warren St. Syracuse, N.Y.
(315)472-6674

Affirmed to before me this 4th, day of February, 1980.

Notary Public

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: CARDAMONE, J.P., HANCOCK, SCHNEPP, CALLAHAN, MOULE, JJ.

John L. Grady and Fatima Grady, Appellants,

v.

Roderick A. McLean, M.D., Respondent.

The above named John L. Grady and Fatima Grady

having appealed to this Court from an order and a judgment

of the Supreme Court, entered in the

Onondaga County Clerk's office on May 22 and 23, 1979,

respectively

and said appeal having been argued by

John Grady of counsel for appellants,

James Ganotis of counsel for respondent,

and due deliberation having been had thereon,

It is hereby ORDERED, That the order and judgment so appealed from be, and the same hereby are unanimously affirmed without costs.

Entered: January 11, 1980

MARY F. ZOLLER, *Clerk*

Judgement On The Merits Dismissing Plaintiff's Complaint In Further Proceedings.

At a Special Term of the Supreme Court of the County of Onondaga at the Court House thereof located in Syracuse, New York on the 3rd day of April, 1979.

PRESENT: HON. JOHN R. TENNEY
Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY,

Plaintiffs

-vs- ORDER

RODERICK A. McLEAN, M.D., Index No. 894/77

Defendant

A motion having been made by defendant for an Order granting summary judgment in favor of the defendant Roderick A. McLean, M.D. pursuant to CPLR 3212, on the ground that there is no triable issue of fact and that there is no merit to the plaintiffs' complaints, and a cross motion having been made by the plaintiffs for an Order vacating summary judgment proceedings and opening defendant's default in answering,

NOW, upon the reading and filing of the affidavit of JAMES G. GANOTIS, sworn to the 22nd day of March, 1979, the affidavit of RODERICK A. McLEAN, M.D., sworn to the 13th day of February, 1979, the affidavit of HENRY W. SCHOENECK, JR., M.D., sworn to the 2nd day of March, 1979, and the notice of motion dated March 22, 1979, all with proof of due service and in support of defendant's motion and upon the reading and filing of the affidavit of JOHN L. GRADY and FATIMA GRADY, sworn to

the 27th day of March, 1979, the notice of cross motion dated March 27, 1979, the affidavit of JOHN L. GRADY and FATIMA GRADY, sworn to the 11th day of April, 1979, all with proof of due service and in support of plaintiffs' cross motion and in opposition to defendant's motion, and upon the appearance of JAMES G. GANOTIS, ESQ., in support of defendant's motion and in opposition to plaintiffs' cross motion and upon the appearance of JOHN L. GRADY and FATIMA GRADY, in opposition to defendant's motion and in support of plaintiffs' cross motion, and upon the Memorandum Decision of the HON. JOHN R. TENNEY, dated May 10, 1979,

NOW, on the motion of MARTIN, GANOTIS & BROWN, attorneys for defendant, RODERICK A. McLEAN, M.D., it is hereby

ORDERED that the defendant's motion for summary judgment is in all respects granted, and it is further

ORDERED that the plaintiffs' cross motion for default is in all respects denied, and it is further

ORDERED AND ADJUDGED that the Clerk of this Court is hereby directed to enter Summary Judgment in favor of the defendant RODERICK A. McLEAN, M.D. and against the plaintiffs JOHN L. GRADY and FATIMA GRADY, dismissing the complaints of the plaintiffs against the said defendant.

DATED: May 21 1979

S/ John R Tenney

J.S.C.

Spec. Term Final Judgement On Grounds That There Is No Merits To Plaintiff's Complaint.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY,

Plaintiffs

-vs- JUDGMENT

RODERICK A. McLEAN, M.D., Index No. 894/77

Defendant

A motion having been made by the defendant for an Order granting summary judgment in favor of the defendant Roderick A. McLean, M.D., pursuant to CPLR 3212 on the ground that there is no triable issue of fact and that there is no merit to the plaintiffs' complaints,

NOW, on the motion of MARTIN, GANOTIS & BROWN, attorneys for defendant RODERICK A. McLEAN, M.D., it is hereby

ADJUDGED that the defendant RODERICK A. McLEAN, M.D., 109 South Warren Street, Syracuse, New York, have judgment against the plaintiffs JOHN L. GRADY and FATIMA GRADY, P.O. Box 270 Elmwood Station, Syracuse, New York, dismissing the complaints of the plaintiffs on the merits.

Judgment signed this 23rd day of May, 1979.

Clerk

317

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION FOURTH DEPARTMENT

JOHN L. GRADY and FATIMA GRADY
Plaintiffs-Appellants,

- vs -

RODERICK A. McLEAN, M.D.,
Defendant-Respondent

Joint Notice Of Appeal

Index No. 894/77

PLEASE TAKE NOTICE, that John L. Grady, and Fatima Grady, the plaintiffs-appellants Pro se, as the aggrieved parties in this appeal, and in the above entitled action, do hereby appeal to the Appellate Division of the Supreme Court, for the Fourth Department.

Plaintiffs, do hereby, and now, further their appeal, pursuant to Article 57 CPLR 5701 (a)(1)(i)(iv)(v) - C-5701:2, by appealing from the Final Judgement entered in the Office of the Clerk, County of Onondaga, signed and dated by the Clerk on the 23rd day of May, 1979, ADJUDGING that the defendant RODERICK A. McLEAN, M.D., 109 South Warren Street, Syracuse, New York, have judgement against the plaintiffs JOHN L. GRADY and FATIMA GRADY, P.O. Box 27 Elmwood Station, Syracuse, New York, dismissing the complaints of the plaintiffs on the merits.

This additional step can include but a single record, C-5501:6, and upon review, it is requested, that ex-parte order, dated 6-1-77, which was granted by, and is in possession of the Judge granting summary judgement, to defendant, with defendant's affidavits on application, that these be made available to this Court, and to appellants. Orders dated, 6-13-77, 8-8-77, 10-5-77, are non-final orders affecting the Final Judgement, are to be reviewed on this appeal, and the appellants will present these three orders, as exhibits in their appendix of their brief to this Court.

Dated June 4, 1979.

With Respect

John L. Grady & Fatima Grady
Plaintiffs-Appellants Pro se
P.O. Box 27, Elmwood Station
Syracuse, New York 13207
458-5500 X-3238

TO: COUNTY CLERK JAMES D. GORHAM
ONONDAGA COUNTY
SYRACUSE, NEW YORK

Martin, Ganotis & Brown
Attorneys for Defendant McLean
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

FILED
JUN 4 12 26 PM '79

Court of Appeals Order Turning On The Federal Question

Appeals Hall in the City of Albany
on the thirteenth *day*
of June *A. D.* 1978

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

No. No. 523
John L. and Fatima Grady,
Appellants,
vs.
Roderick A. McLean, M.D.,
Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

NOTICE OF APPEAL TO COURT OF APPEALS

COURT OF APPEALS OF THE STATE OF NEW YORK

EXHIBIT P.46 Appeal To Court Of Appeals App. Div. Order Deciding Federal Question.

JOHN L. GRADY and FATIMA GRADY,

Plaintiffs-Appellants

- against -

RODERICK A. McLEAN, M.D.,

Defendant-Respondent.

Joint Notice Of Appeal
Index No. 894/77

PLEASE TAKE NOTICE, that John L. Grady and Fatima Grady the plaintiffs-appellants Pro Se, hereby appeals to the Court Of Appeals Of The State Of New York, from a judgement entered in a court of record of original jurisdiction directed to Court Of Appeals, where only a constitutional question may be presented and determined on direct appeal upon grounds of CPA Sec. 588. of Par.1, 1(a).

Order entered in the Office of the Clerk of the Appellate Division, Fourth Department on April 14, 1978, was an appeal to that court from an original order. Whereby, it was adjudged that original order appealed from dated 7/14/77, which was a Memorandum Decision, was final in striking plaintiff's note of issue and statement of readiness from the lower court's Trial Calendar, which was superceeded by a Disclosure Order dated 7/21/77, which was jurisdictionally defective, was affirmed by the Appellate Division.

This appeal is on the grounds of Article 56, Section 5601 (b) 4., primarily involving the construction of only a constitutional question of the " due process clause ", under Article 5, & 14; Article 6, Section 7; as amended in 1943, made effective January 1, 1944, Par. 8, renumbered 19511.

The original certified records in both the Onondaga County Clerk's Office, and the Clerk's Office of the Appellate Division filed on 8/20/7; upon review will show that plaintiffs filed with the Clerk of the Supreme Court, Onondaga County, Syracuse, N.Y. on 6/7/77, a note of issueand statement of readiness, and made a Motion affidavit Application for a Default Judgement, and an Affidavit of Default made returnable at Trial Special Term on 6/27/77,. But following, a show cause order was served upon plaintiffs by respondent received on 6/4/77, for hearing on 6/6/77, at which time, the judge lifted the stay of proceedings. But subsequently after 6/7/77, the court granted the defendant an ex-parte,

Order without notice dated 6/13/77,.

Thereafter, plaintiffs filed a Further Affidavit Of Default dated 6/17/77, and a Affidavit Of Relief to Vacate the temporary restraining Order dated 6/23/77, which the court denied, and a Protective Order also under Affidavit dated 6/20/77, all made returnable on 6/27/77.

Upon review at the hearing on 6/27/77, at Special Trial Term of the lower court, the court's action turned upon the federal question when it denied hearing on vacation of Order dated 6/13/77, and set aside the default judgement where respondent did not! present a reasonable or justifiable excuse for the delay in his pleading answer, nor show a meritorious defense to the court. But simultaneously the court granted defendant's cross motion dated 6/17/77, and 6/22/77, and affidavit in opposition of the default judgement, struck plaintiff's note of issue, and statement of readiness on Memorandum Decision dated 7/14/77, and granted the defendant a Disclosure Order before trial the order appealed from dated 7/21/77, which was jurisdictionally defective, where it recorded, that the defendant served a notice pursuant to CPLR 3121, for a physical examination of plaintiff Fatima Grady, which was objected to by plaintiffs for no such evidence is in the records.

The plaintiffs claim that the court committed a gross abuse in excess of its jurisdiction, and committed prejudicial error as abuse of its discretionary power.

By law: Art. 22 & 50, Sections 2221,subdv. 1-2, and Art. 50, Sec. 5015., the court errored, in refusing hearing on the default, and should have vacated prior order dated 6/13/77, made without notice involving a default judgement, and should not have set the default aside less showing of a meritorious defense. Please see Cochrane v. Gates, 1963, 18 A.D. 2d 1048, 238 N.Y.S. 2d 411.; Cronin v. City of New York, 1963, 18 A.D. 2d 995, 238 N.Y.S. 2d 734.; Bedell Co. v. Harris, 1930 228 A.D. 529, 240 N.Y.S. 550., CPLR 3101 Id. 3101 (a) (4) & (b), as to a defaulting party there is no issue nor adverse party, and disclosure is not available to aid party in estimating damages. Krull v. Sherman, 1965, 48 Misc. 2d 825, 265 N.Y.S. 869. Thereby, the validity of the Federal Statute was drawn into question, actions of the court being against its validity under the Constitutional Laws of the U.S. set forth in 28 USC Section 1257.

Wherefore, plaintiff upon this appeal now move for a Final Determination of this action under Article 50, Section 5016 (c), where the Appellate Division because of its lack in power or jurisdiction to review as heard on April 3, 1978. It is now demanded that the Court perform its duty to rule specifically as enjoined in law. It is also demanded that the plaintiff's Default Judgement be sustained, as seen In re Prime, 1933, 254 A.D. 685, 3 N.Y.S. 2d 414.

Dated: April 20th, 1978.

Respectfully,

John L. Grady Fatima Grady

John L. Grady & Fatima Grady
Plaintiffs-Appellants Pro Se
141 Bishop Avenue
Syracuse, New York 13207

TO: The Office Of The Clerk Of The Court Of Appeals
Albany County
Albany, New York

Appellate Division, Fourth Judicial Department

PRESENT: MARSH, P.J., MOULE, CARDAMONE, HANCOCK, WITMER, JJ.

John L. Grady and Fatima Grady, Appellants,

v.

Roderick A. McLean, Respondent.

The above named John L. Grady and Fatima Grady, plaintiffs

in this action, having appealed to this Court from an order

of the Supreme Court, entered in the

Onondaga County Clerk's office on July 14, 1977

and said appeal having been argued by

John Grady for appellants ~~[illegible]~~,

David Brown of counsel for respondent,

and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be, and the same hereby is unanimously affirmed without costs.

EXHIBIT

Entered: April 14, 1978

MARY F. ZOLLER, *Clerk*

COURT OF APPEALS OF THE
STATE OF NEW YORK

JOHN L. GRADY and FATIMA GRADY,
PLAINTIFFS-APPELLANTS,

- vs -

RODERICK A. McLEAN, M.D.,
DEFENDANT-RESPONDENT.

Notice Of Cross Motion To Vacate Motion To Dismiss Appeal
Index No. 894/77

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit and exhibits, a cross motion will be made at a Term of this Court to be held in the Chambers of the Court of Appeals, Albany, New York on the 7th, day of November, 1977 at 2:00 o'clock in the afternoon of that day for an order vacating respondent's motion to dismiss plaintiff-appellant's appeal from a Final Order of the Appellate Division, Fourth Department, on the grounds of Article 56, CPLR 5601 (a)-(b) Sub d., 1., and CPLR 5501(a), Subparagraphs 1. 2.3.4.; CPLR 5011, and CPLR 5522 Disposition of Appeal, and CPLR 2221. That subsequent orde dated August 8, 1977, which was appealed to the Appellate Division Fourth Department, affected the substantial rights of the appellants, and that discretion was not recited in either Order, and for such othe and further relief as to this Court seems just and proper, together with costs and disbursements of this action.

DATED: SYRACUSE, NEW YORK
OCTOBER 28th, 1977.

Yours etc.,
John L. Grady & Fatima Grady
Pro Se Plaintiffs
141 Bishop Ave, Syracuse, N.Y. 13207

TO: MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant-Respondent
Office & P.O. Address
499 South Warren Street
(315) 472-6674

COURT OF APPEALS OF THE
STATE OF NEW YORK

JOHN L. GRADY and FATIMA GRADY
PLAINTIFFS-APPELLANTS,

- vs - AFFIDAVIT

RODERICK A. McLEAN, M.D.,
DEFENDANT-RESPONDENT.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:

JOHN L. GRADY and FATIMA GRADY, being duly sworn, deposes and says:

1. That they are Pro Se Plaintiffs-Appellants acting under Chapter 111, 28 USC 1654, and that they are fully familiar with the prior pleadings and proceedings heretofore had herein.

2. That this application is made to vacate defendant-respondent's Motion to Dismiss plaintiff-appellant's appeal dated September 28th, 1977, from an Order of the Appellate Division, Fourth Department dated September 23, 1977. A copy of the " Notice of Joint Appeal " is attached hereto as exhibit "A". A copy of the Order of the Appellate Division, Fourth Department is attached hereto as exhibit "B".

3. That appeal does lie without leave if decision in Order appealed from has, or may have been based on grounds involving construction of Constitution. In re Levy, 1931, 255 N.Y. 223,174 N.E. 461., and grounds was non-appealibility of Order dated 8/8/77.

4. That the Court of Appeals in this instant case has jurisdiction to review an un-authorized final judgement on appellate court's Order modifying special term's Order dated August 8, 1977, which denied appellant's substantial motion for default judgement on pleadings, and hence will not dismiss appeal from such judgement, but will reverse it. Luotto v. Field, 1945, 294 N.Y. 460, 63 N.E. 2d 58.

5. That as seen, appellate division's order appealed from, was not an order of affirmance of entire judgement appealed to the Court of Appeals, and appeal lies as of right. Brown v. McCullough, 1934, 264 N.Y. 669, 191 N.E. 618, Affirmod 265 N.Y. 652,193 N.E. 429.

6. That in the examination of the defense's motion to dismiss appeal, motion dated October 24, 1977, its inferred; that the order appealed from is a non-final order, which involves a question of discretion not reviewable by the Court of Appeals, and in rebuttal appell-

ants say! That the issues involved in the subsequent lower court order which is dated 8/8/77, appealed to the appellate division contained issues of three motions made by appellants which were never heard; " Application for Default Judgement to Court ", dated June 7, 1977, before that Court's Order Compelling acceptance of late answer was signed; which was signed on June 13th, 1977. Thereafter, a Further Application of Default dated June 17, 1977, and " Application for Support of Relief from Order dated 6/13/77, compelling acceptance of defendant's late answer, which was served on June 23, 1977, all seen in appellant's briefs on file with the Clerk's Office at Albany.

7. Where Appellate Division's Order as re-instatement or affirmation of Special Term's Order dated August 8th, 1977, which did finally determine all issues in this action or proceeding; and the order appealed from recited the grounds upon which its determination was made, as; non-appealibility of appeal, no reference was made of discretion ! presumption would be that the only question presented to the Court of Appeals fro review, was of law. In re Liberman's Estate, 1959, 6 N.Y. 2d 525, 190 N.Y.S. 2d 672,160 N.E. 2d 912.

8. That it is not authorized for the Appellate Division, to affirm a judgement which is incorrect and unwarranting upon the grounds tried and considered at trial; upon any other supposed grounds, where additional evidence or new facts were made but not heard, and thus deprive the defeated party (appellants) an opportunuty to be heard upon the additional questions. But the same consideration might authorize the Court to grant a new hearing. Svenson v. Svenson, 178 NY 54, 70 NE 120.

9. When an order or judgement is, wholly or partly affirmed as; the subsequent order compelling acceptance was not affirmed by the appellate court's decision, but the other part of that order which did recite Default Judgement was denied, then that Court shall render a final determination unless it deems the matter necessary or proper for remission to another court for further proceedings, CPLR 5522, and this law is uniformly applicable to all appellate Court's. White v. Richmond Light & R. Co. 211 AD 861, 206 NYS 872. This should answer the defense's dependent's position taken on page 2, of his motion to dismiss appeal dated October 24th, 1977, of orders' finality in this action, and as to medical malpractice remaininf pending. The order appealed to the appellate court dated 8/8/77, does involve; " The lack in hearing ", of default judgement entry, and since not heard previously! also involves the construction of the Constitution both State

and Federal. Therefore, this order appealed from being final of all issues involved in both orders, is valid, and will certainly end any other pending liability as medical malpractice, which is not a question in this instant appeal. But if the prior ruling at the Special Term would have been properly settled there would be no need of this appeal, However, this was not the case, and this is what appeal is all about, to seek out reversible errors in law as pertaining to rights of parties, of which discretion that affects appellant's substantial rights is appeallable, under Law.

10. Plaintiff-appellants under law, and upon the grounds of CPLR 4404, had motioned for a new hearing actually, and when denied by the Order dated September 23, and August 8, 1977, is reversible error, and as to the Constitutionality of the appeal to the Court of Appeals, and as to justification of construction of the contitutional question, affirmations made on motions to dismissal of appeal at the appellate level, and the Special Term's denial in the subsequent order to hear plaintiffs-appellant's additional facts, was upon the appellate court's granting dismissal in order dated September 23, 1977, the Court's refusal to hear motions made by the appellants at the Special Term on June 7, 17th, and 23rd, 1977, by judge one, automatically brought into focus CPLR 2221:6 the mandatory transfer to proper judge, and this was done by judge two.

11. Therefore, the granting of dismissal by the appellate court, if upon the claim of re-argument as claimed by the defense, and if the appellate court deemed that no new proof existed, but a seeking to convince judge one that he was incorrect, and if these motions does contain new facts or additional facts which it did, the motions were "renewal" motions rather than a "re-argument" under CPLR 2221:9, and as pertaining to re-argument, if so determined, and the appeal time was still alive, so that a motion to re-argue could not be seen as trying to extend the time for appeal, it may be made to the nisi prius judge or judge two. See William H. Van Vleck, Inc. v. Klien, 50 Misc. 2d 622,271 N.Y.S. 2d 64 (1966). At least in a situation where the governing law changes while an appeal is pending, it should be permissible to have the judge below implement the new law without forcing the appeal through, especially where the appeal has not been perfected and there can thus be a saving of the effort and expense that would have to go into drawing up the record and briefs.

12. The decisive question is whether the Order appealed from was the result of due process, an appeal lies to the Court of Appeals as a matter of right. De Veau 5 NY 236,183 NYS 2d 293,157 NE 2d 165, aff'd 363 US 144,4 L ed 1109, 80 S Ct 1146. It is conclusive that stay of proceedings at Special Term prevented appellants from serving additional motions for consideration to judge one, but was denied hearing by both level courts, but was before judge two on 6/27/77.

13. Lower court records reveals that judge one's subsequent order dated 6/13/77, was gross abuse of the exercise of discretionary power giving no basis for the exercise of discretion, so gross as to be equivalent to defect in power of jurisdiction that was lost over the subject matter not prescribed by the Constitution or Statute. Droege, 197 NY44,90 NE 340; Cox v. Lykes Bros. 237 NY 376,143 NE 226(seamen's wage case); Nann v. Raimist, 255 NY 307,174 NE 690, 73 ARL 669. This subsequent order dated 6/13/77, was followed by a second Final Order dated 8/8/77, which was deemed non-appealable by the appellate division, simultaneously denying plaintiff's application and default judgement affidavit to court.

14. The refusal so far by the appellate court to resettle order appealed from dated October 4,1977, on grounds of CPLR 5712 a,b, c, and CPA 604, presents a question of law reviewable by Court of Appeal Mawhinney v. Milbrook Woolen Mills,231 NY 290,132 NE 93,15 ARL 1506.

14. WHEREFORE request is herein made to vacate the defense's motion to dismiss appeal, together with costs and disbursement of this motion, so appeal may go foward.

Dated: October 28th, 1977.

Yours etc., John L. Grady & Fatima Grady

John L. Grady & Fatima Grady
Pro Se Plaintiffs-appellants
141 Bishop Ave, Syracuse, N.Y. 13207

TO: MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant-Respondent
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13207

Sworn to Before me this 28th, day of October, 1977.

Lucille Cicero

LUCILLE CICERO
Notary Public in the State of New York
Qualified in Onon. Co. No. 4610979
My Commission Expires March 30, 1979

COURT OF APPEALS OF THE
STATE OF NEW YORK

JOHN L. GRADY and FATIMA GRADY,
PLAINTIFFS-APPELLANTS,
- against -
RODERICK A. McLEAN, M.D.,
DEFENDANT-RESPONDENT.

Affidavit Of Mail Service Of Motion To Vacate Motion Of Dismissal Of Appeal
Index No. 894/77

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

John L. Grady appellant Pro Se being duly affirmed, deposes and says:

That on October 28th, 1977, he served the notice of motion to vacate defenses's motion to dismiss appeal to the Court of Appeals, by U.S. Mail service served on Martin, Ganotis, Amsler & Brown, attorneys for defendant McLean-respondent at, the Clinton Street P.O. Window service via Certified Mail, by deposition a true copy of all papers mailed to the Court of Appeals including exhibits etc., in an enclosed envelope in a postpaid wrapper, and that then being the designated address by the defense attorneys for that purpose.

Dated: October 28th, 1977,

Yours etc.,
John L. Grady & Fatima Grady
Plaintiffs Pro Se
141 Bishop Ave. Syracuse, N.Y. 13207

TO: MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant-Respondent
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

Sworn to Before me this 28th, day of October, 1977.

EUCILLE CICERO
Notary Public in the State of New York
Qualified in Onon. Co. No. 4618879
My Commission Expires March 30, 19 79

SUPREME COURT OF THE STATE OE NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

JOHN L. GRADY and FATIMA GRADY,
PLAINTIFF-APPELLANTS,
-against-
RODERICK A. McLEAN, M.D.,
DEFENDANT-RESPONDENT,
MEDICAL MALPRACTICE.

Cross
Notice Of Motion To Argue In Opposition To Dissmiss Appeal

Index No. 894/77

SIR:

PLEASE TAKE NOTICE that the above-entitled appeal will be brought on for argument by the appellants, before this Court at a Term thereof to be held at the Appellate Division Courthouse, located at Rochester New York, County of Monroe, Hall of Justice Fifth Floor on the 19th, day of September, 1977, at the opening of the Court on that day or as soon thereafter as plaintiffs can be heard for an order on cross motion for a Judgement by Default, and Assessment of Damages against the above-entitled action from the order of Justice John R. Tenney dated August 8, 1977, on the ground that the order appealed from is definitely an appealable order, and for such other and further relief as to the Court may seem just and proper.

DATED: Syracuse, New York
September 13th, 1977.

Yours, John L. Grady Fatima Grady
John L. Grady & Fatima Grady
Plaintiffs Pro Se
141 Bishop Avenue
Syracuse, New York 13207

TO: MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant-Respondent
McLean
Office & P.O.Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

STATE OF NEW YORK SUPREME COURT | APPELLATE DIVISION FOURTH DEPARTMENT

JOHN L. GRADY and FATIMA GRADY,
PLAINTIFF-APPELLANTS,
-against-
RODERICK A. McLEAN, M.D.,
DEFENDANT-RESPONDENT,
MEDICAL MALPRACTICE.

AFFIDAVIT

Index No. 894/77

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

JOHN L. GRADY and FATIMA GRADY, being duly affirmed, deposes and says:

1. That they are the plaintiff-appellants Pro Se in the above entitled action, and that they are fully familiar with the prior pleadings and proceedings heretofore had herein.

2. That this affidavit is submitted in support of appellant's opposition motion to be brought on for argument by appellants before this Court, to respondent's motion to dismiss appeal which is dated August 8, 1977, made returnable on September 19th, 1977, and which annexed notice of appeal is dated August 29th, 1977, and was filed in the Onondaga County Clerk's Office on August 29th, 1977.

3. That this is an action for medical malpractice commenced by service of summons and complaint upon defendant personally on December 14th, 1976, as indicated by Exhibits (Y). Respondents served notice of appearance indicated as Exhibit (Z), dated December 30th, 1976.

4. That on January 7th, 1977, at Special Term of the lower Court, plaintiffs served an amended verified complaint as of course upon the defendant's attorneys, indicated as Exhibit (W), and that simultaneously during this same hearing, the Hon. Justice William R. Roy granted leave to appellants to serve a Further Amended Complaint, which is indicated as Exhibit (V). It must also be noticed that at this January 7th, hearing the Trial Calendar Rule 1024.7 (b), was violated, because no opposing party appeared for call, or responded, and this error must be noted as a constant practice by the

defense in this action.

5. That in reply to paragraph six of the respondent's notice of motion to dismiss appeal, dated September 7th, 1977; Appellants say; The defense lost jurisdiction of answering to Affidavit of Default Judgement, because defendant defaulted in pleading, also! Application was properly made within one year, by appellants, which is the time required by law to enter the Default, McGuire v. Weiss, 275 App. Div. 357, 89 N.Y.S. 2d 196 (1st Dep't 1949).

6. The Court's attention is also directed to the respondent's notice of motion to dismiss appeal, paragraph 7, which reveals, that the respondent's Attorney did not mention, that the plaintiffs had served notice of a default judgement, because, no Default Judgement had been filed on June 6, 1977. Therefore, the reason that triggered the defense to seek an exparte order was; the returned late pleading answer by the defense, which appellants returned to the defense Exhibit (R), and proof of this statement can be seen in the Show Cause Order, that defense neclected to file in his moving papers to this Court, and is an error which does not permit dismissal of this appeal, CPLR Rule 2214 (c). Therefore, notice is herein given to this Court, that the Exparte Order, and the Show Cause Order, served upon the plaintiffs in the herein action previously affecting this action be produced by the defense at this hearing with his motion papers. It is herein stated that the original Show cause Order, and the original Exparte Order, served by respondent on plaintiffs, is now retained by the Hon. Justice John R. Tenney, and has not been returned. Now upon reading that Show Cause Order, the defense attorney told Justice Tenney that the plaintiffs may be planing a Default Judgement, which triggered the move by the defense for an Exparte Order.

7. All of the appellant's original pleadings were given to Judge Edward F. McLaughlin at the hearing on January 27th, 1977, indicated as Exhibits (U)&(T), and these papers were not returned, nor received by appellants until July 27th, 1977, as indicated by Exhibit (S), please see these Exhibits above mentioned.

8. We the appellants objects to paragraph 9., of defense's motion to dismiss appeal. It is erroneous and misleading.

Therefore, appellants will now state to the Court exactly what did happen. The evidence contained in Exhibit (O), appellant's Affidavit of Default dated June 7th, 1977, by the notarization of the Clerk of the Supreme Court, Mr. Harry Fluke, that was misdated as June 27, 1977, by plaintiffs do to hurring to file before the County Clerk's Office closed; and additional evidence of exhibits of proof service on the opposing party's attorneys, by U.S. Certified Mail Service, without a doubt shows that the fact of filing of Default Affidavit on June 7, 1977, by appellants, with service on defense was done.

9. Justice John R. Tenney's order Exhibit (1A), dated June 13, 1977, order compelling acceptance of late answer, was signed after his decision to compel acceptance, granted on June 6th, 1977; as claimed by defense's paragraph 7. However, appellants can state with conclusive evidence, that the order compelling acceptance Exhibit (1A), was signed on June 13, 1977, six days subsequent to appellant's filing of Affidavit of Default, that from June 7th, to June 13th, 1977, this Affidavit was on file in the County Clerk's Office, but was not considered, nor recited in this order in question.

But was recited, and considered as to the default upon which it was based, and the Affidavit of Default Application result was stated, as; denied in all respects, in the Final consideration order dated August 8, 1977, as required by Rule Section 5011 CPLR.

10. Now, since Justice Tenney resides in the City of Utica, N.Y., it may be that he did not see, or know of the Default Affidavit filed on June 7, 1977, for at the hearing on June 6th, he told both plaintiffs that the stay of proceedings from the show cause order was lifted, and to prosecute at will. Therefore, the 3, motions; Exhibits (O)-Affidavit of Default, Exhibit (K), Further Affidavit of Default, and Exhibit (L), Affidavit of Support of Relief from Order of compellment, were all before Judge McLaughlin on June 27th, 1977, and by his Final Decision Exhibit (1), dated July 14, 1977, and his Final signing of the Order Exhibit (2), he then referred these motions to Justice Tenney for his consideration, and reconsideration of the facts not known before! and including the affidavit of Default filed on June 7, 1977, which Justice Tenney's

order dated June 13, 1977, read as being served on June 27th, 1977, but by not noticing or reciting the date at the foot, under notarization by the Clerk of the Supreme Court, the Justice either, failed to see, or recite the date as the 7th, of June, 1977, or was not concerned with the fact.

Point 11, Relative To Order From Which Appeal Is Taken:

11. In answer to defenses motion to dismiss appeal paragraph 10, takes some detail, however, by preponderance of evidence, case law, and the CLPR and the CPA, appellants shall prove without a reasonable doubt herein that defenses motion to dismiss the appeal is frivolous. The defense has attempted to interpose, that defense's annexed Exhibit G, order, dated August 8, 1977, from which the appeal is taken is a reargument of the previous order, dated June 13, 1977.

However, the appellants say that this is wishful thinking, and is far from the truth of the matter in facts, in answer to defense's erroneous interposition is this: Now since the defense's tactic of evasion has been shown, upon reviewing the previous order compelling acceptance, and upon reviewing the law of appeal from a special proceeding, CPLR Section 5011. It is therein stated, that a judgement is the determination of the rights of parties and may be either interlocutory or Final, and that a judgement or (order) shall refer to, and state the results of the decision, or recite the default upon which it is based. Now, upon reading the order dated June 13, 1977, at no place in the order is there to be found the appellant's Affidavit of Default filed on June 7th, 1977, nor is there any recital in the order showing the Affidavit of Default as a basis for it's decision, nor was it referred to in that order. These facts can only mean one thing; that the order in question was only based on respondent's exparte motion order served on plaintiffs, to show cause why appellants should not accept the late answer, which is dated February 23, 1977, Exhibit (R), along with the Affidavit of Attorney George F. Mould, sworn to the 1st. day of June, 1977, and the appellant's notice of reply dated June 4, 1977.

12. That as of this motion in opposition, appellant's pleadings including a clear copy of the answer to the show cause order is yet retained by Justice Tenney, who asked to study them -- concerning a settlement of this suit. Now the Affidavit of Attorney George F. Mould is neglected to be put into defence's motion to dismiss,

and as required by Rule 2214(c) CPLR, the defense is herein this motion asked to produce such papers used in their motion. Now, the motion referred to in that previous order compelling acceptance, as being of Martin, Ganotis, Amsler & Brown, was the exparte motion secured order, which was non-appealable, and in the respondent's motion to dismiss the appeal, and because of the absence from their affidavit motion record dated September 7th, 1977, of papers which was used in the trial Court, but neglected to file in his motion papers to dismiss, is thereby not entitled to a dismissal of the appeal, Rosskam v. Curtis, 1894, 15 A.D. 190, 44 N.Y.S. 198.

13. That the subsequent papers used by the respondent in the trial Court and are not found in the appellant's files served on them are: The Exparte Order To Show Cause; The answer sworn to by George F, Mould, dated June 1st, 1977; Appellant's answer to the show cause order dated June 4, 1977. Now upon reading the Final Order from which the appeal is taken, dated August 8, 1977, it in fact is a reconsideration of the whole action, and a denial of the whole facts now before the Court, and certainly is appealable, it contains the recital of the appellant's Affidavit of Default, it denies Vacation of the previous Order, for the first time considers all of the papers not had on June 6th, 1977.

14. Now the Court's attention is specifically directed to the defenses's affidavit to dismiss appeal. How can this attorney for respondent make a sworn statement before this intelligent Court, and swear against the background of prevailing evidence, that! Justice John R. Tenney's order dated June 13, 1977, was granted, on June 6, 1977, hearing; " When no attorney or opposing party responded and was in violation of Trial Calendar Rule 1024.7 (b), by failing to appear, or respond? " and where no excuse was given? Now, it was then! that plaintiffs moved for judgement on the pleadings, and was not then answered, but was denied in the order dated August 8, 1977, for the order dated June 13, 1977, did not recite, nor state the results of the decision on plaintiff's motion for Judgement on the pleadings,? nor recite the default upon which the order was based, and this error is reversible under CPLR Section 5011, for the motion was similar to a demurrer.

14. Now at the June 6, 1977 hearing, Justice John R, Tenney was given all of the plaintiff's original pleadings in a manila folder, because the plaintiffs had moved upon the annexed affidavits of the pleadings. Whether or not! Justice Tenney deliberated on them or not, he must answer. However, since the Affidavit of Default was filed with the Clerk of the Supreme Court on June 7th, 1977, and no answer was given to plaintiffs concerning the demand for Judgement on the pleadings or the Affidavit of Default was not answered before he signed the order compelling acceptance of the late answer, reversible error was comitted by the Court, for CPLR 3215 concerning procedure on application to the Court for Default Judgement, and as provided in CPLR 3215 (b), which is also sustained by CPA Section 490, and the Rules governing the matters which must be proved; Demands! that the Court or Judge must render the Judgement to which the plaintiffs are entitled to, and the determination of damages is then before the Court as their task, McClelland v. Climax Hoseiry Mills, 252 N.Y. 347, 169 N.E. 605 (1930), and this Court refused to answer or to enter the application for Default Judgement, or Judgement on the pleadings, to the granting of a Cross Motion or a Affidavit in Opposition to denial of Outstanding Motions made by plaintiffs, heard on June 27th, 1977.

15. That at this point the appellants asks the Court's permission to allow as evidence! a smeared copy of the plaintiff's answer to the Show Cause Order, which is dated June 4, 1977, Exhibit (Q) until the clear copied answer given to Justice Tenney is returned or that the defense produce this answer at this hearing, and that the Hon. Justice John R. Tenney has comitted reversible error for; returning any of the appellant's pleadings to the defense, and for retaining other papers given to the custody of the Court, on June 6, 1977, causing plaintiffs not to be able to take an appeal against the order dated June 13, 1977, if it was an appealable order by any decision of the Court, all is Abuse of Discretion, see Exhibits (F)-(U) and (T), and, People v. Uran Min. Corp., 1961, 13 A.D. 2d 612, 213 N.Y.S. 2d 1017.

16. Now concerning the un-verified answer to the Show Cause Order, the answer dated June 4, 1977, was received without objection, and this constituted a waiver, therefore the paper was properly before the Court, and is included in the record on appeal to Appellate Division, Whalen v. Corsi, 1952, 279 A.D. 1113, 112 N.Y.S. 2d 499.

17. Wherefore, appellants respectfully request that the Default Judgement be entered, upon which assessment of damages be taken to determine the amount in the bill of particulars, and the Affidavit of Default which is to be made certain, and further for such other relief as to this Court which may be deemed as Just and proper.

Dated; September 13th, 1977.
Syracuse, New York

Yours,

John L. Grady & Fatima Grady

John L. Grady & Fatima Grady Plaintiffs
Pro Se Mailing Address
141 Bishop Ave. Syracuse, New York 13207

TO: MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant-Respondent
McLean
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

Sworn to Before me this 13th Day of September, 1977.

Maureen A. Peck

MAUREEN A. PECK
Notary Public in the State of New York
Qualified in Onon. Co. No. 54-5047785
My Commission Expires March 30, 19-79

Motion For Settlement Of The Record On Appeal
To The Appellate Division

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

John L. Grady and Fatima Grady
Plaintiffs,

-against-

Roderick A. McLean, M.D.
Defendant,

Medical Malpractice.

Notice Of Motion For Affirmation In Compliance With CPLR 5526 Seeking Settlement Of Record On Appeal

Index No. 894/77

SIRS:

PLEASE BE NOTIFIED that upon the annexed affidavit of plaintiffs affirmed to before the under-signed Notary on the day of Sept. 1st 1977, and upon the grounds of Rule 5526 of the CPLR for settlement of the record pending before the Appellate Division at present/or with your Office, a Motion will be made at Trial and Special Term thereof, of this Court, at the County Courthouse thereof at Syracuse, New York on Tuesday, September 6th, 1977, at 9:30 o'clock in the forenoon of that day or as soon thereafter as plaintiffs can be heard for settlement of the Record on appeal.

This notice of motion and the annexed affidavit, and other papers attached, is in double printing on type, and is directed to be reffered to each Justice who heard this case, Judge Edward F. McLaughlin is to retain one duplicate original, and Justice Tenney is to retain the original motion, with annexed papers of the same identical papers.

Dated: September 1st, 1977.

Yours,

John L. Grady Fatima Grady

John L. Grady & Fatima Grady Plaintiffs
441 Bishop Ave, Syracuse, N.Y. 13207

TO: MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant
Office and P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JOHN L.GRADY and FATIMA GRADY
PLAINTIFFS,
--against-
RODERICK A. McLEAN, M.D.

AFFIDAVIT
INDEX NO. 894/77

State Of New York)
County Of Onondaga) SS.:

John L. Grady and Fatima Grady being duly affirmed, deposes and says:

1. That they are the plaintiffs in the herein action, and that they have read the foregoing notice of motion to settle the record on appeal, in affirmation of compliance with Rule 5526 CPLR, and that they are familiar with fully; all prior pleadings and proceedings heretofore had herein, and that the facts contained in this affidavit are true except those stipulated upon their knowledge and belief, and to those they believe them to be true.

2. That since no stenographic record of the proceedings was had during each hearing in open court on June 6th, nor the 27th, 1977, appellants do within the 15 days provided by Rule 5525 (c)(d), after taking the appeal from Justice John R. Tenney's Order dated August 8th, 1977, plaintiffs have also served upon the defendant's attorneys this herein statement under oath; that the proceedings and hearings had on each separate date as above mentioned, and that the record now on file with the Appellate Court, which is also stipulated in the appellant's annexed letters served on the attorney's for defendant, as proof of attempted settlement by agreement of parties which are dated August 22nd, and 23rd, 1977, this record is upon plaintiff's knowledge from our service notifications, and recollection as the best available sources, instead of a transcript minutes which was not had during these hearings as named.

3. That upon the reading of Attorney Edward J. Ansler's letter dated August 25, 1977, as annexed hereto, as it appears, the whole of his objection without any amendment, or other corrections of the record now contained, is that Justice Tenney's intermediate order dated June 13th, 1977, was not appealed from.

4. That now Justice Tenney's Final Order dated August 8th.

1977, is now appealed from, and with this perfection of the same record now on file with the Appellate Division, may put a new aspect into a possible stipulated agreement between parties, and this the plaintiffs most desire.

5. That upon an appeal from an order, the record must contain all papers upon which the orders to be reviewed were made, and used at trial and any opinion of the court, if any, Mills v. City of New York, 1941, 177 Misc. 234, 30 N.Y.S. 2d 121., and upon Rule 5501 (a) CPLR, a final order as; Justice Tenney's denial of appellant's default entry made upon the support of only objectional inferences made by defendant's attorneys in opposition to, and denial or vacation of default application, and upon defendant's cross Motion, and his intermediate order dated June 13th, 1977, compelling acceptance of the late answer, affects the appellant's substantial rights.

6. That as it appears the defense attorneys and the appellants cannot agree to the record on appeal, therefore, it becomes the duty of the appellants to motion before the two Justices who ruled on the case in the first instance, to make certain and sure, that the record filed by the appellants as stipulated, is correct and complete for appeal before the Appellate Division.

7. That each Judge, Justice John R. Tenney, and Judge Edward F. McLaughlin is motioned by this herein motion papers simultaneously, at this term of the court, to be reffered to each respectfully for the settlement of the part of the record as was heard before each, with Justice Tenney receiving the original type, and with Judge McLaughlin receiving an original duplicate of the same papers, and with a copy served on the defendant's attorney of all of these papers they do not have, for settlement of the record now pending before the Appellate Division.

8. That I, John L. Grady husband of, and with wife Mrs. Fatima Grady-patient, do under the affidavit of this motion unequivocally stipulate, and certify under oath that the contents in the record now pending before the Appellate Division; contains each paper that was before the Court that was argued; or used on each question presented in the notice ofappeal dated August 29th, 1977, and these contained in the record and brief of the appellants, and additional papers relating to the disposition of this appeal procedure, and before each Judge, and I; Mr. John L. Grady, further stipulate under oath, that all of the appellant's original pleadings were given to

Judge Edward F. McLaughlin on June 27th, 1977, and was also given to Justice Tenney on June 6th, 1977, and further that Justice Tenney did review the copy of the plaintiff's returned verified answer dated February 23, 1977, and a clear original of the plaintiff's answer to the show cause order, and a few exhibits from the manilla folder, and requested of the plaintiffs to retain the papers abovenamed, which plaintiffs agreed to, and these papers have not as yet been returned. I, Mr. John L. Grady also under oath, stipulate and certify that; Judge Edward F. McLaughlin also reviewed at the trial hearing, Justice Tenney's order dated June 13th, 1977, and all papers that are annexed to the appellant's briefs as pleadings of the appellant's, and papers pertaining to support of evidence relative to proceedings had in the U.S. District Court, that was commenced there on February 10th, 1976, and papers pertaining to our letters to Senate Committee, and papers pertaining to charges against FBI and CIA, and felony complaint filed in U.S. Attorny's Office on February 4th, 1976, and U.S. Attorney's letter to plaintiffs, and that he allowed with the permission of the plaintiffs for Attorney Amsler to take copies of these miscellaneous papers pertaining to trial in U.S. District Court, and that the other papers contained in the record are papers pertaining to the disposition of this appeal procedure relative to possible delay etc.. caused by the handling of plaintiffs papers.

9. I also certify under oath that; no other orders, outside of the orders contained in the record before the Appellate Court, was before either Judge during each hearing, nor argued on, except the show cause order, which is yet in question, as to it's whereabout belonging to appellants.

10. The Supreme Court Special Term, should settle the record on appeal in one form or the other, to permit the appeal to proceed or to permit appeal from order of settlement, Wahrhaftig v. Space Design Gorup, Inc., 1967, 28 A.D. 2d 940, 281 N.Y.S. 2d 500. However, errors which go to the substance of the appeal, and affecting it's course, appellate division will correct them, Mabe L. University of the State Of New York 1950, 276 A.D. 287, 94 N.Y.S. 2d 268., and if the record as certified by appellants did not contain all papers used in the Court below and specified in order, duty rested upon the respondent to move to correct record, Saraceno v. Piccono, 1962, 16 A.D. 2d 735, 226 N.Y.S. 2d 772.

11. That CPA Section 616 and RCP 234 provides that papers included in the record on appeal from an order should not be so literally construed as to compell the printing and presentation of unnecessary and superfluous papers, In re Brady's Estate, 1935, 155 Misc. 242, 280 N.Y.S. 887, affirmed 246 A.D. 619, 284 N.Y.S. 374., and every appellant under CPLR Rule 5528 of the appendix system has the duty of presenting the issues or appeal in a concise and clear manner, Lo Gerfo v. Lo Gerfo, 1968, 30 A.D. 2d 156, 290 N.Y.S. 2d 1005, and every appellant has a clear legal right to settlement of the record, Wahrhaftig v. Space Design Group, Inc., 1967, 28 A.D. 2d 940, 281 N.Y.S. 2d 500., and refusal of respondent to certify record on appeal must not be frivolous, Id.

Dated: September 1st., 1977.

Yours,

John L. Grady Fatima Grady

John L. Grady & Fatima Grady Plaintiffs Pro S
141 Bishop Ave, Syracuse, N.Y. 13207

TO: MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

Subscribed and Sworn to Before me this 1st. of SEPTEMBER August 1977.

Maureen A. Peck

MAUREEN A. PECK
Notary Public in the State of New York
Qualified in Onon. Co. No. 24-3047705
My Commission Expires March 30, 19 79

EXHIBIT P.40
Spec. Term Order With-holding Evidence Upon Settlement Of The Record On Appeal.

At a Trial Term of the Supreme Court of the County of Onondaga at the Court House thereof located in Syracuse, New York on the 29th day of September, 1977.

PRESENT: HON. EDWARD F. McLAUGHLIN
Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY,

Plaintiffs

-vs- ORDER

RODERICK A. McLEAN, M.D.,

Defendant Index No. 894/77

A motion having been made by the plaintiffs for settlement of the Record on Appeal herein,

NOW, upon the reading and filing of the affidavit of JOHN L. GRADY and FATIMA GRADY, sworn to the 1st day of September, 1977 and upon the reading and filing of the reply affidavit of EDWARD J. AMSLER, sworn to the 7th day of September, 1977, and the proposed Record on Appeal, and upon the decision of the Appellate Division, Fourth Department, dated September 23, 1977, and upon oral argument of JOHN L. GRADY and EDWARD J. AMSLER, ESQ. on September 13, 1977 and upon the oral argument of JOHN L. GRADY, FATIMA GRADY and EDWARD J. AMSLER, ESQ. on September 29, 1977 and after due deliberation,

NOW, on the motion of JOHN L. GRADY and FATIMA GRADY, is is hereby

ORDERED that the Record on Appeal from the Order

211F 616

of Justice Edward F. McLaughlin dated July 21, 1977 include only the following documents:

1. Plaintiffs' Notice of Appeal, dated July 18, 1977;

2. The Order of Justice McLaughlin, dated July 21, 1977;

3. The memorandum decision of Justice McLaughlin, dated July 14, 1977;

4. Notice of Motion and affidavit of John L. Grady, and Fatima Grady for a protective order;

5. Notice of cross motion and affidavit of George F. Mould dated June 17, 1977 for an Order striking the plaintiffs' note of issue and statement of readiness and granted defendant hospital authorizations;

6. Further amended verified complaint, dated January 14, 1977;

7. Answer of defendant McLean;

8. Demand for bill of particulars of defendant McLean;

9. Further verified supplemental bill of particulars.

DATED: October 5th, 1977

S/ Edward F McLaughlin
J.S.C.

Appellant's Appeal Not Obviated Below To App. Div. From Order On Settlement Of The Record On Appeal.

APPELLATE DIVISION: FOURTH DEPARTMENT

JOHN L. GRADY and FATIMA GRADY
PLAINTIFFS-APPELLANTS,
- against -
RODERICK A. McLEAN M.D.,
DEFENDANT-RESPONDENT.

Joint Notice Of Appeal
Index No. 894/77

SIRS:

PLEASE TAKE NOTICE, that the above-named plaintiff-appellants hereby appeal to the Supreme Court of the State of New York, Appellate Division, Fourth Department, from a Final Order resettling the record on appeal, made at Trial Term of the Supreme Court of the County of Onondaga, at the Courthouse thereof located in the City of Syracuse. The Order appealed from is dated October 5th, 1977, as indicated, signed by S/ J.S.C. Edward F. McLaughlin, and was served on appellants on October 24th, 1977, as indicated by wrapper, by attorney for defendant Edward J. Amsler.

The plaintiffs-appellants objects and argues that a Constitutional question upon due process is involved, and that the appellants are not satisfied; Because the order only includes defense attorney's suggested documents to the Court as evidenced by the annexed Reply Affidavit, served on plaintiffs, and dated September 7th, 1977, annexed as exhibit (Z). Therefore, appeal is on the grounds of CPLR 5701 (a) 2. (ii), as to settling of record on appeal.

P O I N T ' S

Plaintiffs stipulate under oath that the following additional papers were before the Court and was argued by parties, presented on June 27, 1977, at Trial Special Term: Motions made by plaintiffs; dated: 6/7/77-6/17/77-6/23/77. Also papers relating to CIA & FBI activities as exhibits in support of motions, and previous U.S. Dist. Court action evidence, senate investigating information in the previous case commenced in U.S. Court, and other general information papers relating to previous court action of the same case; also the defense's Affidavit in Opposition to Default Application and Affidavit of Default, and all of the appellant's original pleadings under affidavit. Dated: October 31, 1977

Yours, John L. Grady Fatima Grady
John L. Grady & Fatima Grady
Plaintiffs Pro Se
141 Bishop Ave, Syracuse, N.Y.
13207

To: Clerk's Office Fourth Dept.
Appellate Div. Monroe County
Rochester N.Y. 14614

EXHIBIT

PROOF OF SERVICE THAT NOTICE OF APPEAL DATED OCTOBER 31, 1977, SERVED ON DEFENSE ATTORNEY

No. 307156

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

SENT TO
Martin, Gawler, Cowie & Brown
STREET AND NO.
Attorneys at Law 449 So. Warren St.
P.O. STATE AND ZIP CODE
Syracuse, N.Y. 13202

POSTAGE	.24
CERTIFIED FEE	.40
SPECIAL DELIVERY	
RESTRICTED DELIVERY	
SHOW TO WHOM AND DATE DELIVERED X	.25
SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	
SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	
SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY	
TOTAL POSTAGE AND FEES	$1.09

CONSULT POSTMASTER FOR FEES
OPTIONAL SERVICES
RETURN RECEIPT SERVICE

POSTMARK OR DATE
OCT 31 1977

PS Form 3800, Apr. 1976

PS Form 3811, Apr. 1977

SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- [X] Show to whom and date delivered.....¢
- [ ] Show to whom, date, and address of delivery.....¢
- [ ] RESTRICTED DELIVERY
  Show to whom and date delivered.....¢
- [ ] RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery.$
  (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO: Martin, Gawler, Cowie & Brown Att. at Law 449 So. Warren St. Syracuse, N.Y. 13202

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	307156	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE [ ] Addressee [X] Authorized agent

4. DATE OF DELIVERY 11-1-77

POSTMARK NOV 1 1977

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

☆ GPO : 1977—O-234-332

EXHIBIT — Memorandum Decision Appealed From to the Appellate Division, dated 7-14-77.

Spec. Term-Trial Judge's Decision Followed By His Order Dated, 7-21-77

STATE OF NEW YORK SUPREME COURT COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY,

Plaintiffs,

vs.

RODERICK A. McLEAN, M.D.,

Defendant.

APPEARANCES: JOHN L. GRADY and FATIMA GRADY
Plaintiffs Pro Se
141 Bishop Avenue
Syracuse, New York, 13207

MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant
George F. Mould, Esq., Of Counsel
499 South Warren Street
Syracuse, New York, 13202

MEMORANDUM DECISION

McLAUGHLIN, EDWARD F., JUSTICE:

In Motion #23A defendant has moved at Special Term for an Order pursuant to Article 31 CPLR requiring plaintiffs to supply duly executed authorizations to obtain any and all hospital records concerning the care and treatment of plaintiff, Fatima Grady, and the records of said plaintiff's treating physicians and upon plaintiffs' failure to comply for dismissal of their Complaint.

In this same motion, defendant also seeks an Order pursuant to Rule 1024.4 of the Uniform Calendar and Practice Rules of the Fourth Department striking plaintiffs' Note of Issue, filed by plaintiffs in June 1977, and Statement of Readiness on the grounds that plaintiffs have refused to provide hospital and medical record authorizations and that the case is not ready for trial.

In Motion #26 plaintiffs move under CPLR 3103 for a Protective Order to deny defendant a physical examination of plaintiff, Fatima

Grady or access to the hospital and medical records pertaining to the care and treatment she received as a result of the alleged malpractice of the defendant physician.

This action was instituted by service of a Summons and Complaint for alleged malpractice by the defendant physician in the care and treatment of the plaintiff, Fatima Grady. Her husband, John L. Grady has sued in a derivative action. Both plaintiffs are appearing Pro Se in their respective actions.

CPLR 3101 provides for full disclosure by a party of all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof but upon objection by a party privileged matter shall not be obtainable. Section 3121(a) provides in substance that after commencement of an action in which the mental or physical condition of a party is in controversy, any party may serve notice on another party to submit to a physical or mental examination by a designated physician and may require duly executed and acknowledged written authorizations permitting all parties to obtain the records of specified hospitals relating to such mental or physical condition. CPLR 3103 in substance allows a protective Order denying, limiting or regulating the use of any disclosure device so as to prevent unreasonable expense, annoyance and embarrassment or any prejudice to any person.

In the instant case, the defendant physician, through his attorneys, served a notice pursuant to 3121 CPLR for a physical examination and to obtain all hospital and medical records. The plaintiffs brought on a motion under CPLR 3103 for a Protective Order on the grounds of privilege. It is basic law that by bringing an action for personal injuries in which the mental or physical condition of the plaintiff is affirmatively put in issue by the plaintiff that such party and plaintiff waives the doctor-patient privilege inasmuch as such party places the physical or mental

condition in controversy. Koump v Smith, 25 N.Y.2d 287.

There is sufficient evidence in this case to support the conclusion that the physical condition of the plaintiff, Fatima Grady, has been put in controversy by her by institution of this lawsuit. Therefore, the defendant's motion for a physical examination and production of the relevant hospital and medical records is granted and the plaintiffs' motion for a Protective Order is denied. Plaintiffs are to produce any and all hospital records and medical reports pertaining to injuries which plaintiff, Fatima Grady, claimed resulted from the alleged malpractice in accordance with CPLR 3121 and 1024.25 of the Uniform Calendar and Practice Rules as promulgated by the Appellate Division, Fourth Department.

The relief sought by the defendant in his motion for an Order pursuant to Rule 1024.4 of the Uniform Calendar and Practice Rules of the Appellate Division, Fourth Department, to strike plaintiffs' Note of Issue and Statement of Readiness on the grounds that the plaintiffs have refused to comply with the notice served for physical examination and production of hospital and medical records and that the case is not ready for trial is granted. Under Rule 1024.4(c) this motion is properly returnable on Calendar Part or at Special Term.

SUBMIT ORDER ACCORDINGLY.

Dated: July 14, 1977.

Edward F. McLaughlin
Justice Supreme Court

EXHIBIT — Superseding, Order to Memorandum Decision, dated 7-21-77.

At a Special Term of the Supreme Court of the County of Onondaga at the Court House thereof located in Syracuse, New York on the 27th day of June, 1977

PRESENT: HON. EDWARD F. McLAUGHLIN
Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY,

Plaintiffs

-vs- ORDER

RODERICK A. McLEAN, M.D., Index No. 894/77

Defendant

A motion having been made by the plaintiffs herein for a protective order pursuant to CPLR 3103 denying the defendant a physical examination of the plaintiff, Fatima Grady, and access to hospital and medical records pertaining to the care and treatment of said plaintiff alleged as a result of the alleged medical malpractice of the defendant, and a cross motion having been made on behalf of the defendant for an order pursuant to Article 31 of the CPLR requiring plaintiffs to supply duly executed authorizations to obtain said hospital and medical records and for a physical examination of the plaintiff Fatima Grady and for a further order striking the plaintiffs' note of issue and statement of readiness filed herein,

NOW, upon the reading and filing of the notice of motion and affidavits of FATIMA GRADY and JOHN L. GRADY, sworn

to the 20th day of June, 1977, all with proof of due service and in support of plaintiffs' motion and upon the reading and filing of the affidavit of GEORGE F. MOULD, sworn to the 17th day of June, 1977, and the notice of cross motion dated June 17, 1977, all with proof of due service and in support of defendant's motion, and upon the appearance of JOHN L. GRADY and FATIMA GRADY in support of the plaintiffs' motion and in opposition to defendant's cross motion and upon the appearance of EDWARD J. AMSLER, ESQ., in support of defendant's cross motion and in opposition to plaintiffs' motion, and upon the Memorandum Decision of the HON. EDWARD F. McLAUGHLIN, dated July 14, 1977,

NOW, upon the motion of MARTIN, GANOTIS, AMSLER & BROWN, attorneys for defendant, it is hereby

ORDERED that within thirty (30) days after service of a copy of this Order with notice of entry upon the plaintiffs, that plaintiffs serve upon attorneys for the defendant duly executed authorizations to obtain any and all hospital records concerning hospitalizations of the plaintiff FATIMA GRADY and duly executed authorizations to obtain records of said plaintiff's treating physicians from September, 1971 to the present, and it is further

ORDERED that within thirty (30) days of service of a copy of this Order with notice of entry upon the plaintiffs that plaintiff FATIMA GRADY appear and be physically examined

by a physician of defendant's choosing and it is further

ORDERED that plaintiffs' motion for a protective order is in all respects denied, and it is further

ORDERED that the plaintiffs' note of issue and statement of readiness filed herein be stricken.

DATED: July 21, 1977

Edward D. Lazzelle

J.S.C.

EXHIBIT P.30
Appellant's Appeal To Appellate Division 4th, Dept., From Judge's Memorandum Decision And Order.

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY,
PLAINTIFFS,
-against-
RODERICK A. McLEAN, M.D.
DEFENDANT.

Notice of joint appeal
Index No. 894/77

Sirs:

PLEASE TAKE NOTICE, that the above-named plaintiffs Pro Se, John L. Grady and Fatima Grady hereby under CPLR 5522, 5701 (a), and under the Civil Practice Act Section 584, appeals to the Appellate Division of the New York Supreme Court in and for the Second Departments, and for the Fourth Department of the Fifth Judicial District of the State of New York, from a Final Order entered in the above entitled action in favor of the above named defendant, against the above named plaintiffs/appellants, entered in the Office of the Clerk of the Supreme Court of the City of Syracuse, County of Onondaga, on the 14th, day of July, 1977, adjudging that the plaintiff's action be striken from the trial calendar, which affects the substantial rights of the plaintiff/appellants (Kolar v. Rusiecki, 1962, 18 A.D. 2d 665, 235 N.Y.S. 2d 197). It is herein stipulated under CPLR Section 5501 (c) (d), and also requested for review by the bringing up for review all pertinent intermediate orders and facts relative to this appeal that is before the Court, which are subsequently stipulated and affecting the determination of this final order and appeal (Henry v. New York Post, 1938, 168 Misc. 247, 5 N.Y.S. 2d 716).

This appeal is from the whole of said Final Order, and from each and every part thereof, including all relative questions contained in the appeal and briefs, for determination of all facts and law as of right, under CPLR Section 5701 (a), it is further stipulated herein under Article 57, as applies to the Appellant Division for It's judgement to be Absolute.

POINTS RAISED FOR REVIEW

Point # (1)

In the dated order of motions brought on to be heard in sequence, and subsequent to defendant's exparte order to show cause why plaintiffs should not be compelled to accept defendant's late answer made returnable on June 6, 1977. Plaintiffs are subsequently aggreived over the order of compellment to accept the late answer, which was amended without court leave, and of all subsequent intermediate orders and grievous related facts before this Court.

Point # (2)

Upon June 6th, 1977, where hearing for the show cause order was heard, Rule 1024.7 (b) of the Supreme Court Rules approved and made effective, for the years 1976 and 1977 by the Appellate Division of the Supreme Court for the Fifth Judicial District for the Counties of Oneida, and Onondaga, was violated by the defendant's attorney, and upon call by the Judge, the defense attorney did not answer nor appear, and no excuse was given, thereby the plaintiffs moved for inquest or default judgement, but neither judge granted the motion of affidavit.

Point # (3)

What disposition should have been made of the plaintiff 's entry of default application for judgement, that was filed of served on note of issue, by notification of affidavit on other party, on June 7th, 1977, with the CIerk of the Supreme Court, before any decision or order was made or rendered, intermediate or otherwise.

Point # (4)

Where defendant's opposition to plaintiff's application for the default Judgement, served by defendant on June 17th, 1977, seeking that plaintiff's application for default judgement be denied, or otherwise vacated, but failed to submit in his affidavit of answer any meritorious defense, or that he believed that he had such a defense, and yet default application for judgement was not granted, or the inquest had, what should be done.

Point # (5)

Relative to the Hon. Judge Edward F. McLaughlin, plaintiffs now feel that they cannot receive justice from him, and respectifully ask the Judge to dismiss him self from sitting on any hearings involving this case, or otherwise ask the Court to impeach his authority in this case, as racial prejudice.

For in regards to the Hon. Judge McLaughlin's final order page three, no notice of affidavit has been served on the plaintiffs as of this appeal date, and it was not fair to state that plaintiffs have refused to comply with notice served for physical examination, where there is no evidence under the uniform calendar Rule 1024.25 (b) (c), was served on plaintiffs.

Point # (6)

The plaintiffs are, and have been willing to sign, or provide the defense with all necessary medical information relative to this action, and is now ready to sign any statement indicating what specific information they desire, there is no problem here! the only refusal made verbally at the deposition was; that there is a limit to going back to any or all treatment not relative to this action, and privilege information. The plaintiffs submitted a protective order, because of defendant's attorney's speculative suggestive cry of not having taken a physical examination B.T., as of this late time, in hopes to bring the issue out front, overcoming his fast pleading tactics, which he served on June 17th, 1977.

Point # (8)

Plaintiff's motion for protective order made returnable on 27, day of July, 1977, was completely ignored by the Court, where evidence was submitted that the CIA and FBI was earlier charged with Conspiracy in this medical malpractice with doctors, and that there was suspicion that a CIA and FBI scheme to either cause additional injury, or to annoy or embarrass was planned, and no requested limitation, modification or regulation of any physical examination to be had in the future was given to protect the plaintiff patient-Appellant from any cystoscopic or the placing any foreign instrument into the patient's vagina or rectum, that is very sore sensitive, and causes discharge at any touching. However, many other parts of the appellant patient's body where claim of injury is pending, can be examined to determine the extent of injury, these are; her legs that are swollen from infection, breasts, hernia, arms, and urine specimens. This judge wanted to submit the appellent's life to disposure of any or all kinds of examinations, which is not necessary.

Point # (9)

The appellant patient's life is at stake, and this is a special circumstance case for special consideration, and the extent of injury has already been determined many many times at most of the largest

hospitals in New York State, and the extent of injury is already determined by the laboratory analysis of those institutions, therefore it is not necessary to determine that extent any more as already claimed for liability, there would not be any purpose for such examination to determine the extent of injury.

Point # (10)

Since no notice for a physical examination was given, plaintiffs would be entitled to a protective order whom a demand is served must be answered by the Court.

Point # (11)

No determination of the request made by the plaintiffs on June 6th, 1977, for judgement on the pleadings was had, and was not answered, or any determination made as to whether the double pleadings made by the defense attorney was legal, or was amended without court leave must be answered by the court.

Point # (12)

Where evidence of prior case for this same cause of action, was commenced in the U.S. District Court on February 10th, 1976, and against this same defendant Roderick A. McLean, M.D., which showed that the defendant appeared to be running away on vacation to avoid service, of the summons and complaint, certainly shows willfulness as to the defendant's practice of running, or defaulting technique, and where notification was given to the office of the U.S. Attorney before attempted service or action was commenced.

Point # (13)

If plaintiff appellants are denied justice, and protection under Point # (8), and their plea is ignored although law is shown, then we the plaintiffs/appellants in this case ask for a removal of this action from the civil court and in the interest of justice, that this case be bound over to a Federal Grand Jury here in Syracuse, New York for an investigation of criminal charges against the defendant Roderick A. McLean, the CIA and the FBI, and for others who may be brought in, through evidentiary facts as Criminal Conspiracy perpetrated by the CIA, and FBI Federal Agency, and that the defendant doctor, Roderick A. McLean then be charged with Gross Negligence in medical malpractice with intent to commit a dangerous felony, and conspiracy, accessory after or before the facts, and for others who may be brought in, Intent to inflict serious bodily injury, in conspiracy criminally with the CIA and FBI. The defendant's charge then would be,

Gross Criminal Negligence in medical malpractice, with criminal intent to commit a Felony.

Point # (14)

Plaintiff appellant's take exception to Judge McLaughlin's Final Order page two, paragraph (1), where mention was made that husband John L. Grady has sued in a derivative action, for there should be no question that as presented in the Further amended verified complaint, which is before the Court, stating under Section 212 (a) of the Civil Practice Act that any right to relief jointly arising out of the same transaction or occurence, or series of transactions, and if any question of law or fact, common to all arise in the action, judgement may be given for one or more according to their respective rights for recovery. Therefore, the plaintiff husband's rights to relief does not depend on the extent of injury! But on the defendant's liability and his cause of injury for recovery, and this was not completely answered by the Judge, and must be answered by the Appellant Division.

Dated: July 18th, 1977

Yours, John L. Grady Fatima Grady

John L. Grady & Fatima Grady Plaintiffs Pro
141 Bishop Ave. Syracuse, N.Y. 13207

TO: JAMES D. GORHAM

Clerk of the County of Onondaga

&

Plaintiffs Pro Se John L. Grady
141 Bishop Ave. Syracuse, N.Y. 13207

At a Special Term of the Supreme Court of the County of Onondaga at the Court House thereof located in Syracuse, New York on the day of July, 1977

PRESENT: HON. JOHN R. TENNEY
Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY,

Plaintiffs

-vs- ORDER

RODERICK A. McLEAN, M.D., Index No. 894/77

Defendants

Motions having been made by the plaintiffs for relief from a prior Order of this Court dated June 13, 1977 which compels acceptance of defendant's answer, and for a judgment of default against defendant,

NOW, upon the reading and filing of the Affidavit in Support of Relief from Order of JOHN L. GRADY and FATIMA GRADY, sworn to the 23rd day of June, 1977, and the Notice of Motion for Relief from order compelling acceptance of late answer, dated June 23, 1977 and the affidavit of default of JOHN L. GRADY and FATIMA GRADY, sworn to the 27th day of June, 1977 and the notice of application to Court for judgment upon default, dated June 27, 1977, and the further affidavit of default of JOHN L. GRADY and FATIMA GRADY sworn to the 17th day of June, 1977, all with proof of due service and in support of plaintiffs' motions, and upon the reading and filing of the affidavit of

GEORGE F. MOULD, sworn to the 22nd day of June, 1977, with proof of due service and in opposition to plaintiffs' motions, and upon the decision of the HON. JOHN R. TENNEY dated August 22, 1977,

NOW, on the motion of MARTIN, GANOTIS, AMSLER & BROWN, attorneys for defendant, it is hereby

ORDERED that plaintiffs' motions herein are in all respects denied.

DATED: August 8, 1977.

J.S.C.

Filed & entered
August 11, 1977. 1:40 PM
Tom D Cannon

210F 15

3450 FE 0.00 A ORD— Pre AUG-11-77 1 40

OF SAID COUNTY
AND COUNTY LAW.

OCT -7 1977

PURSUANT TO SEC. 505 COUNTY LAW.

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY,
PLAINTIFFS,
-against-
RODERICK A. McLEAN, M.D.
DEFENDANT.

Notice Of Joint Appeal
Index No. 894/77

Sirs:

PLEASE TAKE NOTICE, that due to delay caused by plaintiff's pleadings being delayed on return to appellants from the Court's care certainly has affected the course of this appeal, and are errors that has gone into the substance. Therefore, the above-named plaintiffs Pro Se, do herein on the grounds of CPLR 5522, 5701(a) 2. 3., and CPLR 5501(a)(b)(c)(d), and under the Civil Practice Act Section 584, appeals as a matter of right to the Appellate Division of the New York Supreme Court in and for the Fourth Department, of the Fifth Judicial District of the State of New York, from a Final Order entered in the above entitled action in favor of the above-named defendant-respondent, against the above-named plaintiff-appellants, entered in the Onondaga County Clerk's Office, on the 8th, day of August, 1977, adjudging that the appellant's motion for a default entry be denied, or that any relief/or vacation from an intermediate order compelling acceptance of respondent's late served answer.

This notice of appeal is upon the prior record and brief filed in the Appellate Court, and is to make the record perfected for proper review and settlement of the record before the two Justices who heard the action in the first instance.

This appeal is from the whole of said Final Order, from each and every part thereof, for determination of all facts and law, upon the grounds of CPLR Section 5701(a), it is further stipulated herein under Article 57, as applies in the Appellate Court; for it's Judgement to be absolute, and it's review be of all pertinent intermediate orders, decisions, and other Final Orders as contained in the record, that affects the course of this appeal, and the errors that has gone into the substance, and substantial rights of appellants in this appeal.

-1- Exhibit

POINTS ORDERS AND DECISIONS
RAISED FOR REVIEW

Point # (1)

The intermediate orders brought on by both Justices which affect their final orders, are orders affecting this appeal, these are: Justice Tenney's intermediate order dated June 13, 1977, Judge McLaughlin's memorandum decision dated July 14, 1977, and Judge McLaughlin's final order dated July 21, 1977, and Justice Tenney's Final Order dated August 8, 1977, all are for review. Plaintiffs were aggrieved over the order of compellment to accept the late answer.

Point # (2)

On June 6th, 1977, during hearing for the show cause order, Rule 1024.7 (b) of the Supreme Court Rules approved and effective for the years 1976/77 by the Appellate Division of the Supreme Court for the Fifth Judicial District for the Counties of Oneida and Onondaga, was violated by the defendant's attorney, for no appearance was made by any one, no excuse was made then, thereby the plaintiffs moved for an inquest or default judgement, but neither Justice granted the motion of affidavit, or made a ruling until August 8th, 1977.

Point # (3)

What disposition shoud have been made of the plaintiff's affidavit of default, that was filed or served on notice, and note of issue, on June 7th, 1977, mistakenly dated June 27, and with the Clerk of the Supreme Court Onondaga County, before any decision or order was made or rendered, intermediate or otherwise?

Point # (4)

Where defendant's opposition to plaintiff's application for default judgement, served on the defendant on June 7, 1977, and answered by defense on June 17th, 1977, by seeking that plaintiff's application be denied, or otherwise vacated, but failed to submit in his affidavit of answer any meritorious defense, or that he believed that he had such a defense, yet the default application of entry was not granted, or the inquest had, what should have been done?

Point # (5)

Relative to the Hon. Judge Edward F. McLaughlin, plaintiffs now feel that they cannot receive justice from him, and respectfully ask the Judge to dismiss him-self from sitting on any more hearings involving the merits of this case, after his settlement of the record, for now racial tensions as prejudice is felt by appellants.

For in regards to the Hon. Judge McLaughlin's final decision page three, no notice of affidavit has been served on the plaintiffs as of this appeal date, and it was not fair to state that plaintiffs have refused to comply with notice served for physical examination, where there is no evidence under the uniform calendar Rule 1024.25 (b) (c), was served on plaintiffs.

Point # (6)

The plaintiff are, and have been willing to sign, or provide the defence with all necessary medical information relative to this action, and is now ready to sign any statement indicating what specific information they desire, there is no problem here! the only refusal made verbally at the deposition was; that there is a limit to going back to any or all treatment not relative to this action, and privilege information. The plaintiffs submitted a protectice order, because of the defendant's attorney's speculative suggestive cry of not having taken a physical examination B.T., as of this late time, in hopes to bring the issue out fron, overcoming his fast pleading tactics, which he served on June 17th, 1977.

Point # (8)

Plaintiff's motion for a protective order made returnable on 27, day of June, 1977, was completely ignored by the Court, where evidence was submitted that the CIA and FBI was earlier charged with Conspiracy in this medical malpractice with doctors, and that there was reason to believe that a CIA and FBI scheme to either cause additional injury, or to annoy or embarrass was planned, and no requested limitation, modification or regulation of any physical examination to be had in the future was given to protect the plaintiff patient-appellant from any cystoscopic or the placing of any foreign object into the patient's vagina or rectum, thats very sore sensitive, and any touching causes additional discharge. However, many other parts of the appellant's body where claim of injury is pending, can be examined to determine the extent of injury, which are; her legs, breasts, hernia, arms, urine specimens etc., but Judge McLaughlin permitted the appellant's life to exposure of any or all kinds of examinations, and which is not necessary.

Point # (9)

The appellant patient's life is at stake, which is a special circumstance case for special consideration, while the extent of injury has already been determined many many times at most of the largest hospitals in New York State, and the extent of injury is already de-

termined by expert laboratory analysis of these institutions, therefore it is not necessary to determine the extent of injury any more as already claimed for liability, there would not be any purpose for such examination to determine the extent of injury.

Point # (10)

Since no notice for a physical examination was given, plaintiffs would be entitled to a protective order when demand is served, is answered in the brief.

Point # (11)

No determination of the request made by the plaintiffs on June 6th, 1977, for judgement on the pleadings was had, and was not answered, or any determination made as to whether the double pleadings made by the defense attorney was legal, or was amended without court leave must be answered by the reviewing Court.

Point # (12)

Where evidence of prior case for this same cause of action, was commenced in the U.S. District Court on February 10th, 1976, against the same defendant Roderick A. McLean, M.D., which showed that the defendant appeared to be running away on vacation to avoid service, of the summons and complaint, certainly reveals willfulness as to the defendant's practice of running, or defaulting technique, and too; where notification had been given to the U.S. Attorney's Office on February 4th, 1976, before attempted service or action was commenced.

Point # (13)

If plaintiff patients are denied justice, and protection under Point # (8), and their plea is ignored although law is shown, then we the plaintiff-appellants in this case ask for immediate removal of action from the State Court into the Federal Court in the interest of Justice and law, for this case could have been commenced in that Court in the first instant for Criminal investigation, and that it be bound over to a Federal Grand Jury in Syracuse, N.Y., for investigation of criminal charges against the defendant, his attorney, the CIA, and the FBI, and others who may be brought in, through evidentiary facts as criminal conspiracy perpetrated by the FBI and CIA, and that the defendent doctor Roderick A. McLean then be charged with Gross Criminal Negligence in medical malpractice against Mrs. Fatima Grady, with intent to comit a dangerous folony(homicide), and Assessory after the fact or before the facts, and for others, who may be brought in on factual charges of; Intent to inflict serious bodily injury, in criminal conspiracy with the FBI and CIA.

Point # (14)

Plaintiff-appellants take exception to Judge McLaughlin's Final Decision page two, paragraph (1), where mention was made that husband John L. Grady has sued in a derivative action, for there should not be any question, that as it is presented in the appellant's amended verified further complaint which was, and is before the Court, stating under section 212 (a) of the Civil Practice Act, that any right to relief jointly arising out of the same transaction or occurrence, or series of transactions, and if any questionnof law or fact, common to all arise in the action, judgement may be given for one or more according to their respective rights for recovery. Therefore, the plaintiff-appellant husband's rights to relief does not depend on patient's extent of injury ! for relief; But on the defendant's liability and his cause of injury(loss of wife's services) for recovery, However, this point of argument or fact, was touched on by the Hon. Judge, but was not completely answered, and must be answered by the Appellate Court.

Dated: August 29th, 1977.

Yours, John L. Grady Fatima Grady

John L. Grady & Fatima Grady Plaintiffs Pro S
141 Bishop Ave. Syracuse, N.Y. 13207

TO: JAMES D. GORHAM

CLERK Of The County Of Onondaga
Plaintiff Pro Se John L. Grady
141 Bishop Ave. Syracuse, N.Y.
13207.

Form 11. DAILY RECORD CORP.

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: MARSH, P.J., MOULE, HANCOCK, GOLDMAN, WITMER, JJ.

John L. Grady and Fatima Grady, Appellants,

-vs-

Roderick A. McLean, M.D. Respondent.

EXHIBIT P.38 PAGE A-22
App. Div. Order
Denying Appellant's Cross
Motion To Charge The
Federal Question For
Default Judgement.

A motion having been made on the part of the respondent to dismiss the appeal to this Court taken in the above entitled action, from an order of the Supreme Court, entered in the office of the Clerk of the County of Onondaga dated August 8, 1977, on the ground that the order is not appealable and for other relief and a cross-motion having been made by appellants for a judgment by default and assessment of damages and for other relief

Now, upon reading and filing the affidavit of Edward J. Amsler sworn to September 7, 1977, the notice of respondent's said motion, together with proof of due service the opposing affidavit of John L. and Fatima L. Grady sworn to September 13, 1977, the notice of appellants' cross-motion with proof of service thereof,

and due deliberation having been had thereon,

It is hereby ORDERED, That respondent's motion be, and the same hereby is granted and the appeal so taken is hereby dismissed without costs, and

It is further ORDERED, That appellants' cross-motion be and the same hereby is denied.

Entered: September 23, 1977

MARY F. ZOLLER, *Clerk*

EXHIBIT

COURT OF APPEALS OF THE STATE OF NEW YORK

JOHN L. GRADY and FATIMA GRADY,
PLAINTIFF-APPELLANTS,
-against-
RODERICK A. McLEAN, M.D.,
DEFENDANT-RESPONDENT.

Notice Of Joint Appeal

Index No. 894/77

Sirs:

PLEASE TAKE NOTICE, that the above-named plaintiff-appellants John L. Grady and Fatima Grady, hereby appeal to the Court of Appeals to the Office of the Albany County Clerk, Albany, New York.

On the grounds of CPLR Section 5601 Subd., (d)-(b), from an order of the Appellate Division Fourth Department, Clerk's Office, Rochester, N.Y., Mary F. Zoller on September 23rd, 1977, in favor of respondent, and against appellants adjudging that the Order in question which is dated August 8, 1977, was not an appealable one. (Wolf v. Assessors of the Town of Hanover 1955, 308 N.E. 416, 126 N.E. 2d 537).

The order appealed from dated September 23, 1977, Finally Determines appellant's prior non-final order dated June 13th, 1977, from the Trial Court, Onondaga County, and necessarily affects the appellant's appeal dated August 29th, 1977, which was an appeal from a previous Final Order originally made on August 8, 1977, because of the Justices's claim! " of not seeing any cause, or evidential facts to vacate same." when his decision was claimed by respondent to have been reached.

The instant appeal from the final judgement of a court of record of original jurisdiction is directed to the Court of Appeals, (Ballon v. Piti, 1934, 264 N.Y. 67, 190 N.E. 153, and on grounds of CPLR 5601 (b), for there is directly involved the construction of the Constution of the State, Article 6, Section 3, Subd., b. par (8); and C.P.A. Section 588; and upon grounds of CPLR Section 5601 (b) where it is stated; That constitutional questions may be presented,

and determined on direct appeal., (I.L.F.Y. Co. v. Temporary State Housing Rent Commission, 1962, 11 N.Y. 2d 259, 228 N.Y.S. 2d 814, 183 N.E. 2d 220).

This notice of appeal is on the original record, and prior record and brief, presently filed in the Appellate Division of the Supreme Court of New York, and the question involved is a constitutional question.

Appellants Pro Se, duly have appeared personally in this action as permitted in all courts of the United States, under Chapter 111, 28 U.S.C. 1654, in which parties may plead and conduct their own cases personally, or by counsel as, the rules of such courts, respectively, permit them to manage, and conduct causes therein; May 24, 1949, c. 139, Sec. 91, 63 Stat. 103., and make the following affirmation under the penalties of perjury: " That this actionable question was previously tried on the issue of non-appealability of Order dated August 8, 1977 resulting in dismissal at end of appellant's cause in question. It is respectfully submitted that issues of law yet exist un-resolved.

The respondent's motion dated September 7, 1977, shows argument that appellant's cross-motion was only a re-argument, of a settled question from the Trial Court order dated June 13, 1977; Which is far! from the fact or law, it was not a settled order, until exhibit F, annexed hereto, and in the record; Where the respondent admitted, that the order dated June 13, was not an original order, until it was signed after Justice Tenney had reviewed additional evidence not known! as appears in the order dated June 13, until his signing of the Original Order dated August 8, 1977, which is appealable under the statute.

This appeal is not a re-argument of the June 13th, order, but an appeal! under the Statute involving the construction of the State Constitution as to the validity of the appeal, which was dismissed on the grounds of; non-appealibility, and which under CPLR Sec.5601(b), and CPA 588, becomes a single issue reviewable by the Court of Appeals.

Dated: September 28, 1977.

Yours etc, John L. Grady Fatima Grady
John L. Grady & Fatima Grady
141 Bishop Ave.
Syracuse, N.Y. 13207

TO: Clerk Of The
County Of Albany
Albany, N.Y. 12207

State of New York,
Court of Appeals

EXHIBIT P.44
Order Of The Court Of Appeals
Dismissing Appellant's Appeal
Involving The Federal Question.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first *day of* November *A. D. 1977*

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

4 No. No. 1035
John L. Grady and Fatima Grady,
Appellants,
vs.
Roderick A. McLean, M.D.,
Respondent.

A motion having heretofore been made upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that it does not lie.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

ATTORNEY'S LETTER AS EVIDENCE OF PLAINTIFFS PLEADINGS DATED 8-2-77

MARTIN, GANOTIS, AMSLER & BROWN
COUNSELLORS AT LAW
499 S. WARREN STREET
SYRACUSE, N.Y. 13202

WILLIAM F. MARTIN
JOHN GANOTIS
EDWARD J. AMSLER
DAVID E. BROWN

PAUL A. BROWN
GEORGE F. MOULD

AREA CODE 315 472 6674
315 472 5471

August 2, 1977

RE: GRADY v. McLEAN

Mr. John L. Grady
141 Bishop Avenue
Syracuse, New York 13207

Dear Mr. Grady:

This office is in receipt of the original papers which were submitted by you to Judge McLaughlin and in turn forwarded to Judge Tenney for his decision on your motions.

We are presently preparing an Order for Judge Tenney's signature. As soon as Judge Tenney signs the Order, the original papers, along with the original Order will be filed in the Onondaga County Clerk's Office.

Very truly yours,

Edward J. Amsler

EJA:mo

cc: Hon. John R. Tenney

EXHIBIT

EXPARTE CHARACTERIZED PRE-TRIAL ORDER COMPELLING
COMPELLING ACCEPTANCE OF DEFENDANT'S DEFAULT IN PLEADING SERVED

6-16-77

At a Special Term of the Supreme Court of the County of Onondaga at the Court House thereof located in Syracuse, New York on the 6th day of June, 1977.

PRESENT: HON. JOHN R. TENNEY
Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY,

Plaintiffs

-vs- ORDER

RODERICK A. McLEAN, M.D.,

Defendant Index No. 894/77

A motion having been made by Order to Show Cause for an Order compelling the plaintiffs to accept the Answer to the Further Amended Verified Complaint and demand for bill of particulars which were previously served on the plaintiffs,

NOW, upon the reading and filing of the affidavit of GEORGE F. MOULD, sworn to the 1st day of June, 1977 and the Order to Show Cause of the HON. JOHN R. TENNEY, dated June 1, 1977, all with proof of due service and in support of defendant's motion, and upon the reading and filing of the Notice of Reply to Court Order To Show Cause Why an Order Should Not be Made, dated June 4, 1977, with proof of due service and in opposition to defendant's motion, and after due deliberation,

NOW, on the motion of MARTIN, GANOTIS, AMSLER &

EXHIBIT F-3

BROWN, attorneys for defendant, it is hereby

ORDERED that defendant's motion herein is granted without costs, and it is further

ORDERED the plaintiffs accept the answer to the further amended verified complaint and demand for bill of particulars of the defendant, and it is further

ORDERED that defendant's time within which to serve his answer and demand for bill of particulars be extended to ten (10) days after entry of this Order.

DATED: June 13, 1977

S/ Allen R. Tenney
J.S.C.

STATE OF NEW YORK
CITY OF SYRACUSE
COUNTY OF } ss.:

, being duly sworn, deposes and says that he is the in the within action; that he has read the foregoing and knows the contents thereof; that the same is true to h own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me, this
day of 19

STATE OF NEW YORK
CITY OF SYRACUSE
COUNTY OF } ss.:

, being duly sworn, deposes and says that he is the of the corporation named in the within entitled action; that he has read the foregoing and knows the contents thereof; and that the same is true to h own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by is because the said is a corporation and deponent is an officer thereof, to-wit, its

Sworn to before me, this
day of 19

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
CITY OF SYRACUSE
COUNTY OF } ss.:

being duly sworn, deposes and says, that he is over the age of years. That on the day of , 19 , at No. in the County of City of New York he served the foregoing upon the in this action, by delivering to and leaving personally with said a true copy thereof.

Deponent further says, that he knew the person served as aforesaid, to be the person mentioned and described in said as the therein.

Sworn to before me this
day of , 19 } GEORGE F. MOULD

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
CITY OF SYRACUSE
COUNTY OF ONONDAGA } ss.:

Margaret Orr being duly sworn, deposes and says that she is a clerk in the office of MARTIN, GANOTIS, AMSLER & BROWN, the attorneys for Defendant herein.

That on the 16th day of June 19 77 she served the within Order upon John L. Grady and Fatima Grady the above named Plaintiffs by depositing a true copy of the same securely enclosed in a post-paid wrapper in the Post Office—a Branch Post Office Station—Sub-Station—Finance Station—Letter Box—Mail Chute—Official Depositary maintained and exclusively controlled by the United States at 499 South Warren Street, directed to said at No. 141 Bishop Ave., Syracuse, N. Y., that being the address within the State designated by them for that purpose upon the preceding papers in this action, or the place where they then kept an office between which places there then was and now is a regular communication by mail.

Margaret Orr

Sworn to before me this 16th
day of June 19 77

STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

JOHN L. GRADY and FATIMA GRADY
PLAINTIFFS,

-vs-

RODERICK A. MCLEAN, M.D.
DEFENDANT.

Notice Of Motion For Relief from order Compelling Acceptance Of Late Answer
Index No. 894/77

MEDICAL MALPRACTICE.

Sir:

PLEASE TAKE NOTICE, that upon the summons and verified complaint and proof or service thereof, and upon the annexed affidavits, and upon the ground of CPLR 5015 (a), and upon such terms as may be just, plaintiffs will direct that due to Court's error in oversight in compelling plaintiffs to accept the defendant's late answer by order, and as to plaintiff's substantial evidence, that order be vacated, to be made at Trial and Special Term of this Court, Part 1 thereof, at the County Courthouse Syracuse, New York, on 27th, day of June, 1977, at 9:30 o'clock in the forenoon, or as soon thereafter as plaintiffs can be heard for Relief from Order on evidence of law (University v. Parella, 1937, 162 Misc. 220, 294 N.Y.S. 146).

Dated June 23rd, 1977.

Yours, John L. Grady Fatima Grady
John L. Grady & Fatima Grady Plaintiffs Pro Se
141 Bishop Ave. Syracuse, New York 13207

TO: MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

Copy

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JOHN L. GRADY and FATIMA GRADY
PLAINTIFFS,

-vs- AFFIDAVIT in support of Relief from
RODERICK A. MCLEAN, M.D. Order
DEFENDANT. Index No. 894/77
MEDICAL MALPRACTICE.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

JOHN L. GRADY and FATIMA GRADY being duly affirmed deposes and says:

1. That they are the plaintiffs Pro Se in the entitled action.

2. That this action was commenced by the personal service of the summons and verified complaint upon the defendant on the 14th, day of December, 1976, as appears on by the annexed affidavits of proof. That thereafter on the 30th, day of December, 1976, the defendant has defaulted in serving his answer to the plaintiff's further amended verified complaint, and upon exparte show cause order has secured an order to compell the plaintiffs to accept such late answer.

3. That the main controversy began upon plaintiff's returning of defendant's more than 16 day late verified answer; returned on 5/26/77.

Subsequently the defense attorney by exparte secured an order serve on plaintiffs to show cause, why; the plaintiffs should not be compelled to accept their late answer. However, delay on the part of the service of the show cause order upon the plaintiffs, resulted in the plaintiffs being unable to properly answer by mail service, and to obtain affidavit on saturday and sunday before 9:30 o'clock on monday, the 6th, day of June for the scheduled hearing, when the order was made returnabl by the defense.

4. That the defense attorney did not appear at the hearing, so that plaintiffs cound not serve him personally with an answer, but did mail him an answer subsequent to the hearing on the 6th, day of June, 1977.

5. That at the hearing, the Honorable Judge Tenney in open Court before Mr. and Mrs. Grady said: That the stay of proceedings was lifte and that he wanted to keep plaintiff's papers temporarily.

6. That subsequently the plaintiffs immediately without delay, pro

 EXHIBIT E B

ceeded to continue to answer this show cause order by the filing of a note of issue, with statement of readiness, since the examination B.T. was finished, and the exchange of medical reports was settled at the deposition which was completed by both parties, on June 7, 1977; and subsequ ntly followed by the plaintiff's entry of default judgement.

7. That afterwards on the 17th, day of June, 1977, the defense attorney served on the plaintiffs an order signed by Judge Tenney on June 13th, 1977, 6 days after plaintiffs note of issue had been filed; compelling plaintiffs to accept the returned late answer and bill of particulars. Plaintiffs herein are relying on Items of evidence "13" and "17", as additional evidence, not withstanding that due to the Court's congested calendars, and the defendant's delay in service of the order to show cause, served upon the plaintiffs about the 3rd, of June, 1977, caused inability for plaintiffs to secure affidavit in time for Court following on saturday and sunday, which could not have been discovered by the presiding Judge in time, and having to make a motion for default at another term of the Court, resulted in Court's oversight as error.

8. That the main controversy being the show cause order, and order compelling plaintiffs to accept the defaulted pleading, and the defendant later cross motion for an order striking plaintiffs note of issue, may properly be determined at the same time; provided in law; that it does not delay the plaintiff's priority rights of adjudication, or to delay judgement in the main controversy (Deneau v. Beaty, 1949, 195 Misc. 649, 91 N.Y.S. 2d 190).

9. That it is improper to include findings of fact as part of the judgement (People v. Reinforced Paper Bottle Corp., 1941, 176 Misc, 268, 27 N.Y.S. 2d 14).

10. That Rule 5015 (a) may be employed to relieve a party from judgement or order, upon such terms as may be just, on motion on grounds of; error or oversight without appellate review. For a Court's judgement is void if it is in excess of power granted to it by particular statute although it has jurisdiction over the parties in the matter before it (Peopel v. Hart, 1954, 206 Misc 490, 133 N.Y.S. 2d 98). , and a voided judgement binds no one, and the would be defaultee may ignore such judgement or resist it or assert it's invalidity at any and all times (Syracus Engeneering Co. v. Brown, 1947, 73, N.Y.S. 2d 446).

11. That when the annexed affidavits, and recitals are checked, the Court will be convinced that the order of compellment is contrary to law, and must be denied. For where the defendant is in default, he is not entitled as a matter of right to an order requiring plaintiffs to accept their verified answer, and not withstanding that the default was for a period only between January 14th, 1977, and February 23, 1977, the last day answer could be timely served (Bell v. Poly Seal 231 N.Y.S 2d 419).

12. That a defense which merely pleads conclusions of law without supporting facts is insufficient (Mac Iver v. George Graziller, Inc., 1961, 32 Misc. 2d 477. 224 N.Y.S. 2d 364).

Dated: June 23rd, 1977.

Yours. John L. Grady Fatima Grady

John L. Grady & Fatima Grady Plaintiffs Pro Se
141 Bishop Ave. Syracuse, N.Y. 13207

TO: MARTIN, GANOTIS, AMSLER & BROWN
Attorneys for Defendant
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

Subscribed and Sworn to Before me this 23rd, day of June, 1977.

RAYMOND P. PROWAK, Notary Public in the State of New York, Onondaga County, No. 34-3159015 My Commission Expires March 30 19[illegible]

EVIDENCE OF DEFAULT IN FEDERAL COURT

DEFAULT

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED
APR 30 1976
AT ____ O'CLOCK ____ M.
J. R. SCULLY, Clerk

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action UTICA 76 CV 58

Mrs. Fatima Grady, Plaintiff
Mr. John L. Grady, Co-Plaintiff

V.

Dr. Roderick A. McLean, Defendant

NOTICE OF MOTION
For Application Of Demand For Default Judgement

TO: MARTIN, GANOTIS. AMSLER & BROWN
Attorneys for defendant
Office & P.O. Address
499 South Warren Street
Syracuse, New York 13202 (315) 472-6674

PLEASE TAKE NOTICE that a motion for an application of demand for Default Judgement, has been filed under Rule 55, F.R.C.P., at the Clerk's office at the Federal Building, Utica, New York.

The plaintiffs are requesting that this motion be given prerogative, due to apparent evidence now unfolded. Therefore, the plaintiffs move the Court, which is already being brought on by the defendant's motion to dismiss the plaintiff's claim, on a challenge of; lack of subject matter jurisdiction, requested for hearing on May 10, 1976, at 10:00 O'clock A.M., at the United States Court Building, Clinton Street, Syracuse New york.

A copy of this affidavit, and notice of motion, together shall be fowarded to the Attorneys for the defendant, to their office as above, after the Clerk's stamp has been put upon each of the three sets of copies

This notice is based upon this notice, the pleadings, records and files herein; on the affidavit of Mr. John L. Grady affirmed to the 30th, day of April, 1976

Dated: Utica, New York

Representative: Mr. John L. Grady

Address: 14 Bishop Ave., Syracuse, N.Y. (13207)

DEFAULT

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
NEW YORK

Civil Action No. 76 CV 52

Mrs. Fatima Grady, Plaintiff
Mr. John L. Grady, Co-Plaintiff

V.

AFFIDAVIT

Dr. Roderick A. McLean, Defendant

STATE OF NEW YORK)
COUNTY OF ONONDAGA)

JOHN L. GRADY, being duly affirmed, bear witness and says:

1. That he is the Representative for the plaintiffs, and Co-plaintiff of MRS. FATIMA GRADY, and that he is fully familiar with the prior pleadings and proceedings heretofore had herein.

2. That this is affidavit is submitted in support of a motion to demand a default judgement, pursuant to Rule 55 F.R.C.P..

3. That this is an action for medical malpractice commenced by the filing of a complaint on February 23, 1976, and processed by the service of a summons on March 31, 1976, when defendant came back off of vacation.

4. That this affidavit is in request by the plaintiffs for default judgement, for the amount due, and costs against the defendant Dr. Roderic A. McLean, who appears to be in default for failure to appear, to plead, or to defend.

5. The affirmative relief sought is indicated in the complaint, and being for the sum of $ 1,000,000.00 one million dollars. Plaintiffs filed a permissive joinder claim with rights to relief alternatively arising out of the same transaction, the Co-plaintiff's prayer of relief is for the sum of $ 9,000.00 nine thousand dollars, interest and costs.

6. Evidence: Failure to appear, and failure to plead or otherwise to defend as provided in the Federal Rules Of Civil Procedure, or to plead within the time allowed by the rules.

7. The defendant was properly summoned, by the evidence of submitti himself to the service of the summons, and in the State of New York, on March 31, 1976, at his place of abode, or office.

8. On april 26, 1976, upon the plaintiffs appearance at the Court hearing held, the Honorable Judge presiding, had no answer to any pleading

Paragraph 8. Continued:
or responsive pleading to the complaint. However, the defendant's attorneys sent the Representative of the plaintiffs an original copy of affidavit with a notice of motion, for the plaintiffs to appear at the United States Federal Building, Clinton St. Syracuse, New York, in a motion to move the Court at Syracuse, New York to dismiss the plaintiff's original claim, with the challenge that the plaintiffs claim did not give the United States District Court jurisdiction, or subject matter jurisdiction. There appeared no District Court stamp, seal or initials on this notice of appearance, seemingly a kind of hippocket type of service.

9. The overruling of this precedent motion for default judgement against the defendant is herein being interposed for May 10, 1976, at 10:00 O'clock A.M., at the Federal Building, Clinton Street, Syracuse, New York, for orderly practice require that the plaintiffs motion for default judgement should first be disposed of, where it is necessary for the plaintiffs seeking default judgement to bring the motion on for disposition.

10. That this affidavit is a request to the Clerk at the United States District Court at Utica, New York to enter the default against the defendant, Dr. Roderick A. McLean.

Affirmed to before me this
30th, day of April, 1976.

Representative: Wm L. Grady
Address: 141 Bishop Ave., Syracuse
Zip 13207

Rene' Cominsky

RENE' COMINSKY
Notary Public in the State of New York
Appointed in Oneida County
My Commission Expires March 30, 1978

Fred G. Steckmeyer
3/30/77

Evidence & proof of service abn
Federal Court Date 4/30/76

REGISTERED NO. 77687

Value $ N/V	Special Delivery $
Reg. Fee $ 1.25	Return Receipt $ .20
Handling Charge $	Restricted Delivery $
Postage $ .24	☐ AIRMAIL

POSTMASTER (By) 93

POSTMARK UTICA, N.Y. APR 30 1976 USPO

MAILING OFFICE

FROM Mr. John J. Grady
141 Bishop Ave
Syracuse N.Y.

TO Martin J. Glavin and Peter
499 South Warren St
Syracuse N.Y.

G.P.O. 1974—535-543

PS Form 3811, Jan. 1973

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

SENDER: Complete items 1, 2, and 3. Your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☐ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY. Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
77687		

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☒ Authorized agent

C P Ryan

4. DATE OF DELIVERY 5-3-76 POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆ GPO: 1975—O 550-047

CERTIFIED RECORD IN FEDERAL COURT

GRADY, JOHN L., GRADY, FATIMA	McLEAN, RODERICK A., Dr., Gynecologist of Syracuse, N.Y.

CAUSE Malpractice

76-CV- 58

ATTORNEYS

John L. Grady, Representative 141 Bishop Ave. Syracuse, N.Y.	Martin, Ganotis, Amsler & Brown, Esqs 499 S. Warren St. Syracuse, N. Y. 13202

"I certify that
This is a true copy

Attest 2/12/76

J. R. [illegible]
Clerk, U.S. District Court

By [signature]
Deputy

CHECK HERE CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.O. NUMBER	CARD	DATE MAILED
	2/10/76	47418	65	JS-5	
				JS-6	

76-CV-58

DATE 1976 -	NR.	PROCEEDINGS
Feb. 10	1	Filed complaint-issued summons-orig. & 1 copy & delivered to the Marshal for service
eb. 23	2	Filed amended complaint
ar. 30	3	Filed Petition to Practice
Apr. 1	4	Filed summons served 3/31/76 on Dr. Roderick A. McLean, MD
Apr. 6	5	Filed Notice of Motion returnable Apr. 26, 1976, at Utica & Motion for Exception of Process of Service of Summons
Apr. 19	6	Filed Notice of Appearance
r.19	7	Filed Notice of Motion returnable May 10, 1976 at Syracuse & affidavit of Edward J. Amsler
pr. 23	8	Filed amended notice of motion
pr. 22	9	Filed Notice of Motion, returnable May 10, 1976 & related papers
pr. 26	10	Filed Note of Issue for September 1976 term of court at Syracuse-Jur
r. 26		Motion for exception to process service of summons-Adjourned to Syracuse on May 10, 1976
r. 30	11	Filed Notice of Motion for Default Judgment, returnable May 10, 1976, & Affidavit of John L. Grady
lay 4	12	Filed Notice of Motion, returnable May 10, 1976 at Syracuse for an Order denying any application for a special appearance & Affidavit of John L. Grady
ay 5	13	Filed Notice of Motion, returnable May 10, 1976 at Syracuse to Strike Affidavit of Defense
ay 5	14	Filed Notice of Motion, returnable May 10, 1976 to Strike plaintiffs' of issue pursuant to Rule 12(f) F.R. C. P. & Affidavit of Edward J. Amsler
ay 5	15	Filed Affidavit in Opposition by Edward J. Amsler
ay 7	16	Filed Affidavit in opposition
ay 10		Motion to Dismiss-Edward Amsler admitted for the purpose of arguing the motion. Motion to dismiss granted without prejudice.
ay 13	17	Filed Order of Judge Port (5/12/76) that the motion to dismiss is gra and that the action is dismissed without prejudice for lack of subje matter jurisdiction,etc.
ay 13	18	Filed Judgment

AS APPEARS DEFENDANT WAS RUNNING AWAY TO AVOID SERVICE OF SUMMONS

U.S. MARSHALS SERVICE
INSTRUCTION AND PROCESS RECORD

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.

PLAINTIFF: John L. Grady (husband) Mrs. Pauline Grady (wife)
COURT NUMBER: 75-CV-58

DEFENDANT: Roderick A. Kelcan MD PC Gynecologist
TYPE OF WRIT:

NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
Dr. Roderick A. Kelcan MD PC Gynecologist

ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)
320 State Tower Bldg., Syracuse, N.Y.

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW:

John L. Grady
141 Lodge Ave
Syracuse, N.Y.

Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc. — NO. 1 OF TOTAL 1

CHECK IF APPLICABLE:
[X] One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included.

SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.

SPECIAL INSTRUCTIONS:
Available Mon Wed & Fri.
at office noted above

SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR: Christine M. Kelly
TELEPHONE NUMBER:
DATE: 2/9/76

TUES

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Amount of deposit (or applicable and sign USM-285 for first writ more than one writ submitted.
Write receipt for the total number of writs and for the deposit (if applicable) shown.

DEPOSIT/CODE	DIST. OF ORIGIN	DISTRICT TO SERVE	LOCATION OF SUB-OFFICE OF DIST. TO SERVE

SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK: [signature] DATE: 2/10/76

I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.

I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.

NAME AND TITLE OF INDIVIDUAL SERVED (If not shown above)

☐ A person of suitable age and discretion then abiding in the defendant's usual place of abode.

ADDRESS (Complete only if different than shown above)

FEE (If applicable): $3.00 | MILEAGE: $.72

NAME OF ENDEAVOR (Use Remarks if necessary)	DATE OF SERVICE	TIME	SIGNATURE OF U. S. MARSHAL OR DEPUTY
KFC	3/31/76	2 PM	[signature]

Vacation 3/17/76 would be back 3/26/76

State of New York
Court of Appeals

Joseph W. Bellacosa
Clerk of the Court

Clerk's Office
Albany 12207

May 2, 1978

Mr. John L. Grady
Elmwood Station
Box 27
Syracuse, New York 13207

Re: Grady v. McLean

Dear Mr. Grady:

I acknowledge receipt of your 500.2 jurisdictional statement in connection with the above-entitled matter.

The Court may examine its subject matter jurisdiction sua sponte with respect to whether the order sought to be appealed is one which finally determines an action as contemplated by CPLR 5601. Further, it does not appear that a substantial constitutional question is directly involved in the appeal (CPLR 5601[b][1]). Rather, the determinations on the motions appear to involve only statutory interpretation and evidentiary and factual determinations.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persist in the appeal, you are invited to present to the Court in writing within

ten days of this letter's date your comments justifying the retention of subject matter jurisdiction. Your adversary is likewise afforded this opportunity.

Very truly yours,

Joseph W. Bellacosa

Joseph W. Bellacosa

DMS:im

cc: Martin, Ganotis, Amsler & Brown, Esqs.

92D CONGRESS
2d Session

SENATE

DOCUMENT
No. 92-82

U.S. Constitution

THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

ANNOTATIONS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JUNE 29, 1972

PREPARED BY THE
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AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.*

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Article VI

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

RECEIVED
JUN 3 - 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOHN L. GRADY and FATIMA GRADY
ELMWOOD STATION
BOX 27
SYRACUSE, NEW YORK 13297

May 30, 1980

Clerk Of The Court Of Appeals
Albany, New York 12207

Re: Index No. 894/77 Grady v. McLean

Dear Sirs:

The Appellants in this case request that you prepare, and transmit the entire record to the Clerk of the Court of the Supreme Court of the United States.

Appellants also request that you send that office a list of the documents comprising the record that you are transmitting, and that you notify the Appellants of the same.

Dated: May 30, 1980.

Yours,

John L. Grady - Appellant Pro se
P.O. Box 27 Elmwood Station
Syracuse, New York 13207

c.c. Martin, Ganotis & Brown

STATE OF NEW YORK

S U P R E M E C O U R T

APPELLATE DIVISION FOURTH DEPARTMENT

JOHN L. GRADY and FATIMA GRADY

Plaintiffs-Appellants,

- vs -

RODERICK A. McLEAN, M.D., Defendant-Respondent

Index No. 894/77

BRIEF OF PLAINTIFFS-APPELLANTS

Statement Of Facts

This is an action in medical malpractice, initially commenced, in Federal District Court at Utica New York, on February 10,1976. However, on April 26, 1976, the defendant defaulted, by non-appearance, before that Court, in Utica, New York. The plaintiff's complaint, in Federal District Court, Syracuse, New York, was dismissed, on May 10, 1976. The reason given was for lack of subject matter jurisdiction. The plaintiffs then commenced instant action, in State Supreme Court at Syracuse, New York, against defendant by personal service of summons, and complaint, on December 14, 1976, which was followed by defendant's attorney's appearance and pre-motion to dismiss. See pages A-56 to A-61 the pleadings, as to when issue was joined, following defendant's pre-answer motion served, on December 30, 1976, which must be determined on this appeal.

The appeal before this Court, relate to the Final Judgement, dismissing, the plaintiffs-appellant's, complaints, on the merits, and for review, of appellant's Cross Motion to vacate Summary Judgement proceedings, for review of prior entry of default affidavit against the defendant, that has never been reviewed, due to an incomplete record, before this Court, on prior appeal, which could not be obviated and further, for review on all non-final orders affecting the Final Judgement.

Up to this point in time, procedure has been plenary, and upon appeals by appellants, resulting from very bad faith pleadings, on the part of the defense, even to the misleading of this Court, by perjurious claims, amounting to Excess In Abuse Of Jurisdiction. See appellant's"Reply Brief," page 15, Par. 8, 9.. Prejudicial errors compounded by racial discrimination, has brought on Article 6.2., A Fereral Question, as to due process of law in procedural hearings,

and upon this appeal, and prior appeal, has afforded the only opportunity to bring such before the Court. Special Term on June 27, 1977, resisted hearing the plaintiff's default affidavit, so that technical rules, of procedure, has been, and is again, used, or attempted to be used, to limit, and defeat appellant's cause of action.

QUESTIONS PRESENTED:

(1) When plaintiffs as adverse parties, made a Cross Motion, to vacate, Summary Judgement, Motion proceedings, at Special Term, in order for Court, to hear prior entry of default, against the defendant; Was the Court in error, for not hearing the default first, and by not admitting, the default affidavit, as evidence, on a question of law, in the determination, of Summary Judgement?

The Judge refused to hear the Cross Motion, returning all relative papers to plaintiffs, and granting ten days within which plaintiffs were to serve their answer.

(2) Plaintiffs did not perfect a prior appeal to this Court, relative to settlement of the Original Record, that could not be obviated, due to delay caused by the defendant, and his unresponsiveness, in violation of Fourth Department Rule of Practice 1000.5, Subdv. C(2) and (4), relating to service of records; However, plaintiffs can now show evidence, beyond any reasonable doubt, that their motions, omitted from the record previously, was before the Court at Special Term, and was argued. Can the Order on settlement of the record on prior appeal stand?

Judge Two signed the Order, omitting material evidence, referring plaintiff's motions back to Judge One in another venue, stating that he could not vacate Judge One's Order of Compellment.

(3) Was the Court's decision correct, in granting Summary Judgement, to defendant, on evidence of law, or facts, that was contrary to reason, and inconsistent, with the truth in all the papers before the Court, or was attempted to be submitted before the Court, evidence clearly showing, that the Court's Decision was contrary to law, or facts, upon which the Judgement could be granted, and if upon review, evidence is found to be contrary to reason, and truth, in granting Summary Judgement, to defendant; Should the Judgement be reversed, set aside, or granted to opposing parties?

Judge's Decision states; "That in any event, plaintiff's affidavit, nor complaint, did not state a cause of action."

(4) After plaintiffs have taking proceedings for a default judgement within the required year, after default occurs; Was defendant, entitled to an order requiring plaintiffs to accept defendant's verified answer as a matter of right, and to then be subsequently granted a Summary Judgement, when the defendant did not serve good reason for his default?

Judge Two, at Trial, passed over the default affidavit application made by plaintiffs to Court, and referred the papers back to Judge

Question (4) Continued.
One, who said; That he saw no reason to vacate his order of compellment and denying the motion in every respect.

(5) Could defendant establish his cause as being meritorious, when evidence within the Cross Motion by appellants, was refused admittance before the Court, which could have convinced the Court, of defendant's defenseless cause of action, because defendant sought relief therefrom in his opposing affidavit, but did not disclose the nature of his defense, an unyielding requirement of law?

(6) The basis for Court's decision for rendering Summary Judgement in favor of defendant on evidence stating; That the doctor found that there was an infection and treated it with cauterization. Yet!, to the contrary, in his answer, under oath!, the defendant-doctor specifically denied that material allegation in the complaint, which was never disclosed to the plaintiff-patient as such, and stated; that upon his initial examination, tests, diagnosis, and treatment throughout the course of his examinations, that the plaintiff-patient did not have any infection as she complained of. Does this evidence show the Court that there is no meritorious defense to this action, and that the Judgement rest on sham pleadings of denials?
The Court said that the plaintiffs had no cause of action.

(7) Whereupon plaintiffs objected at trial, for Summary Judgement proceedings, and in defendant's motion papers, and the Judge's Decision, an unclearified non-specific objection, what appears as a pre-answer objection, but was omitted as to its specificity, upon which, grounds of the Judgement rest; Should the Court on its own, make a 3211 objection treating it as a Summary Judgement Motion under CPLR 3212, unless it aprises the parties of its intentions, thereby enabling parties to submit proof reflecting on the case, where the objection was not submitted on any specific ground?

(8) Where defendant's, alleged defense, appear to be an after thought, conceived by way of creating a defense, appearing to be sham. Should the Court, strike out, unsound, and insufficient, affirmative defenses?

(9) Where defendant failed to file answer within time, and plaintiffs filed motion for default judgement, and for assessment of damages, and in the opposing affidavit, the defendant failed to submit a copy, of his proposed anwer, or any proof of affidavit, or otherwise, that he had such a defense, Should plaintiff's motion be granted?

The Judge extended defendant's time, within, which to plead, or answer, to ten days after Order of Compellment was entered.

(10) Upon review of the Record, if it is established, that plaintiffs injury, is stated in the papers; Should Summary Judgement, on the basis that injury cannot be discerned, as stated in the Judge's Decision, thus granting Judgement to defendant stand, or should opposing parties have Judgement to be remitted against the movant in the absence of a cross motion, and in favor of the plaintiffs-appellants?

The Judge said that he could not discern the injury.

A R G U M E N T

POINT (1)

The Court at Special Term is in the same position as a trial court, therefore, when it excludes admissible evidence, the exclusion of that evidence is prejudicial error, affecting the substantial rights, of the aggrieved parties, unless all of the papers, and proof submitted, or is attempted to be submitted, before the Court, has not been denied by the Court, so that cause of action can sufficiently be put before the Court. If however, the Court excludes admissible evidence; The exclusion of that evidence, by the Court, violates the rights of the one whose evidence was excluded, which means prejudicial error. The rights of the plaintiff's were violated, because the Court excluded the plaintiff's evidence. See Cross Motion for default judgement, exhibit "1", on page A-18. Therefore Judgement granted in favor of defendant, by the Court, must be reversed, or granted, in favor of opposing party, as was done in similar circumstances. (Turner v. Town of Naples, 1947, 68 N.Y.S.2d 473); (Di Bone v. Gambucci, 1967, 54 Misc.2d 446, 282 N.Y.S.2d 855); (Carlson v. Travelers Inc. Co., 1970, 35 A.D.2d 351, 316 N.Y.S. 398). According to CPLR 3212(b), C-3212:15; The Court should have permitted plaintiffs to present any evidence available, as opposing parties, to be submitted on the motion, the pleadings, admissions, also any other form of evidence, may be used, and any verified pleading, being the equivalent of an affidavit. See CPLR 105(q); (FRCP 61); (28 USC Sec. 2111).

POINT (2)

Upon review of the prior original settlement of the record before this Court, from order made at Special Term, order dated 10-5-77, exhibit O, on page A-45, but which could not be obviated, or cured below. The plaintiffs appealed from that order on settlement of the record, and it may be raised, and is now raised, for the first time, on appeal. (Telara v. Telara, 1069, 25 N.Y.S.2d 433, 306 N.Y.S.2d 920,255 N.E.2d 158). Its clear, that the results would have been different, and in favor of the plaintiffs, if submitted evidence, had been heard. See defense attorney's formed Order, dated, 10-5-77, exhibit O, on page A-45, that was signed by Judge Two. Also read, FRCP 61; 28USC Section 2111; Also See, exhibit A-46, on page A-46, plaintiff's notice of appeal, dated 10-31-77. Also see exhibit A-43,, on page A-43, motion dated 9-1-77 by plaintiffs. Also see exhibit A-44, on page A-44, defense's Reply Affidavit, dated 9-7-77.

POINT (2) Continued

As to further argument on settlement of the prior record, please see exhibits on pages A-40 to A-55; Also see exhibits (2), p.52, exhibit (6), p. 56, exhibit (18) p. 68, in the Original Record, now on file in this appeal. See the Reply Brief of Plaintiffs-Appellants on prior appeal to this Court, p. 13, the defendant's Notice of Motion to dismiss prior appeal, where perjury was committed, on September 7, 1977. This Order on settlement of the prior record on appeal to this Court, must be overturned, and cannot stand, as required by statutory law. CPLR 2221; CPLR 5015, is grounds for reversal of the Final Judgement, as affecting the Final Judgement, and the Order dated May 21, 1979, granting Summary Judgement to defendant. CPLR 5501 (a)(1).

POINT (3)

Search of the record reveals, that the plaintiff's application, and affidavit of default, was clearly before the Court, at Special Term, on 6-27-77, also was notarized by the Clerk of the Supreme Court, Onondaga County, Syracuse, New York., on 6-7-77, and was duly entered against the defendant. See exhibit p. A-47. Notice of Application To Court For Judgement Upon Default. Also exhibit p. A-48. Further Affidavit Of Default served on 6-17-77. Also see exhibit p. A-49. Notice Of Motion For Relief From Order Compelling Acceptance Of Late Answer. Motion served on 6-23-77. There was no reasonable, excuse given in defendant's answer affidavit, in opposition, dated 6-22-77, exhibit A-50, p. A-50, nor any reasonable cause, for the delay of his verified answer. Therefore, when the Court granted the defendant an ex-parte Order, dated 6-1-77, and denied plaintiff's motion, for default judgement hearing!, and also granting defendant, an extension of time to plead, and no good cause was shown, the Court erred. It also was an abuse of Court's jurisdiction. Default Judgement is now available to plaintiffs, appellants. See the case of; (Duby v. Martin, 109 N.Y.S. 503 (1951); (CPLR 214); (CPLR 2221); (CPA Section 98); RCP 85.

POINT (4)

After plaintiffs, had taken proceedings, for entry of default judgement, on application, to the Court; exhibit p. A-47, A-48, & A-49, defendant, was not entitled as a matter of right, to orders, dated 6-13-77, exhibit "K", p. A-40, or exhibit "K1", p. A-41, requiring plaintiffs, to accept defendant's verified answer, since defendant was in default. CPLR 3215(c)., also see (Poly-Seal Corp., 1962, 34 Misc.2d 1054, 231 N.Y.S.2d 419). Defendant, was also not entitled to

POINT (4) Continued

Summary Judgement proceedings afterwards. See exhibit p. A-47 & A-48, exhibit p. A-49, CPLR 5015; CPLR 2221; FRCP 60; CPLR 214. No motion was made by defendant for reasons of mistake, inadvertence, suprise, excusable neglect, newly discovered evidence, fraud, or misrepresentation. Therefore, defendant's motion, in opposition exhibit p. A-50, still, did not affect, or suspend, the fimality, of the default judgement, or proceedings, to judgement, nor suspend its operation. Objection, is made, by, plaintiffs appellants, on grounds that the Judge was in error, for disobedience, to statutory requirement, to hear; or render, the relief to which plaintiffs appellants, were entitled by law. CPLR 2221; CPLR 3215(c). This is reversal error.

POINT (5)

The party seeking Summary Judgement, upon an affirmative claim, must plead proper cause of action, and has the burden of, establishing, such cause of action. CPLR 3212(a)(b)(e)(1)(2); Also see the case of; (District Att. of Nassau County v. Farrington, 1967, 56 Misc.2d 904,290 N.Y.S.2d 132). The defendant's claimed defense, as denials, cannot possibly show cause of action. Defendant defaulted six times, and made no attempt, to establish his cause of action, on affidavit of answer. Therefore, defendant, cannot be entitled, to any relief, such as permitting him to open his default in pleading, or otherwise, moving, where there is a question, as to the validity, of his excuse, never heard. Defendant also, did not show, any merits, in his affidavit, or in his answer, as to his cause of action. See exhibit p. A-39, on six defaults. Also CPLR 3215(c); 5015; FRCP 60, and cases; (Emery v. Mayrand, 1967,28 A.D.2d 631, 280 N.Y.S.2d 199); (Copperman v. Labanski, 1958,13 Misc.2d 827,178 N.Y.S.2d 451), Statutory disobedience, is grounds for reversal, because the judgement rest on error.

POINT (6)

The defendant's papers, and proof submitted to the Court on May 3, 1979, is not substantial, therefore does not warrant Summary Judgement in defendant's favor, according to the record. It will also be found to be unsubstantial, because the defendant, has not pleaded an affirmative defense. However, upon search of the record, the Court will find, that the appellants established a good cause of action, accord to law, therefore Summary Judgement should have been granted to appellants. See CPLR 3212(b)., also see (Edward F. Dibble Seedgrower v. Jones, 1927, 130 Misc. 359,233 N.Y.S. 785).

A R G U M E N T

POINT (7)

When the Court's Special Term Order dated 5-21-79, granted Summary Judgement in favor of the defendant, and dismissing the plaintiff's complaints on the merits in Final Judgement Dated, 5-23-79, and the Court on its own, based its CPLR 3212 Judgement, on a CPLR 3211(a) (7), or paragraph (2), grounds for objection, and treated it as a Summary Judgement Motion, the Court erred. (CPLR 2111(c), 1973 Amendment. Also see (Mareno v. Kibbe,32 A.D.2d 825,302 N.Y.S.2d 324 (2d Dep't 1969); also (Black v. Long Island R. Co., 1976,54 A.D.2d 570,387 N.Y.S.2d 131. Special Term should not, on its own initiative, have treated a 3211 Motion to dismiss plaintiff's complaints, by saying, that plaintiffs, failed to state a cause of action; as one for Summary Judgement, because defendants did not make a request for such relief, in their affidavit, also there was no indication that the parties were informed of the Court's intention to so treat the motion.

The Court's Decision did not make clear, its scope, or objection relative to CPLR 3211, this was omitted, and the Judge did not write any specific opinion. The Judge's Decision is very vague concerning the specific matter, which appeared as, an attempt to reflect a CPLR 3211 pre-answer motion. The 1973 Amendment of CPLR 2111(c), most definitely, and specifically, require,that parties may have, an adequate opportunity to address whatever additional proof they have in support of respective postures on the motion. Special Term did not aprise parties of its intention, which if it had done, would have enabled parties to submitany proof they had reflecting on the case, such as the default affidavit against the defendant. The scope of a 3211 ground may be narrow, depending on the particular ground the pre-answer motion rest, and if it was not the nature of such non-specific ground to invite proof, plenary as proof, would be on a Summary Judgement Motion. CPLR 3018(b) directs that the defendant include in his answer, anything he has by way of affirmative defense.

POINT (8)

The Court must strike insufficient affirmative defenses, and direct Summary Judgement for opposing parties, where the defendant impliedly conceded that there were no issues of fact, and where defendant's allegations of proof does not establish a valid defense. CPLR 3212(b). (Ford v. Hahn,1945,269 A.D. 436,55 N.Y.S.2d 854. See, also, Cresta Blanca Wine Co. v. R.C. Williams & Co.,1946,64 N.Y.S.2d 548.

A R G U M E N T

POINT (9)

Statutory obedience is to grant the relief to which appellants, are entitled by law. CPLR 3215(c). CPLR 3212(b). The case in example is; Turner v. Town of Naples, 1947,68 N.Y.S. 2d 473, and plaintiff's-appellants motion would be granted.

POINT (10)

Where the Court's Decision dated, 5-10-79, made a statement that; no discernment of the plaintiff-patient's injury was seen in the papers, and the Final Judgement rest on such support, or inference, (a deduction to be drawn from the facts , or evidence as proof) it must appear that the evidence support the inference, but if the evidence is not is not established in truth, the Decision and Judgement must be overturned as non-credible evidence. It is of certainty that the plaintiff-patient's injury is explicitly evidenced in the Bill of Particulars, and medical reports of expert gynecologists. (39 Utah F, 617). Evidence of the same kind and quality is required to support a motion for Summary Judgement, as would be necessarily furnished at trial if one were had. (Bern Contracting Corp. v. Shelton 525 Lexington Corp., 1960 N.Y.S.2d 863).

Wherefore, plaintiffs-appellants Prose in this action respectfully requests, that the Final Judgement dated, May 23, 1979, now on file in the Onondaga, County Clerk's Office, be reversed on the law, and the facts, and that default judgement be granted to plaintiffs-appellants, on demand as articulated in the Bill of Particulars, with costs and interest, on this Court's Order of Remand, to take assessment of damages, and that Order granting Summary Judgement to defendant, dated, May 21, 1979, be reversed on the law, and be instead, granted to plaintiffs-appellants, where no facts are shown at trial.
Dated: June 29, 1979.

With Respect,

John L. Grady

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 894/77

JOHN L. GRADY et., and FATIMA GRADY - APPELLANTS

- v -

RODERICK A. McLEAN, M.D., - APPELLEE

Affidavit Of Service

State Of New York)
County Of Onondaga)
City Of Syracuse) SS.:

JOHN L. GRADY, being duly affirm deposes and says:

1. That he is one of the Appellants in the above entitled action, acting pro se at law.

2. That on May 30, 1980, he did serve a Notice of Joint Appeal with proof of service on the Appellee's Attorney, to the New York State Court of Appeals Clerk's office, from a final judgement entered in that office on April 29th, 1980, and a letter requesting that court to prepare the record and transmit it to the Clerk's office of the United States Supreme Court.

3. That also on May 30th, 1980, that he did serve the identical copied papers above named, on Defendant's Attorney Office at 499 South Warren Street, Syracuse, N.Y. 13202, the address given for that purpose. All by Certified mail enclosed in a post-paid enveloped.

Dated May 30, 1980.

Respectfully,

John L. Grady Appellant Pro se
P.O. Box 27 Elmwood Station
Syracuse, New York 13207
458-5500 3238

c.c. Martin, Ganotis & Brown
Attorneys for Appellee
499 South Warren Street
Syracuse, New York 13202
(315) 472-6674

Affirmed to Before me this 30th, Day of May, 1980.

RAYMOND P. PRZYWAK, Notary Public in the State of New York, Onondaga County, No. 31-0102015
My Commission Expires March 30, 1981